Supreme Court, U.S.
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No. 95-____

In the

Supreme Court of the United States

OCTOBER TERM, 1995

CARMINE CASELLA,

Petitioner,

v.

EQUIFAX CREDIT INFORMATION SERVICES AND TRANS UNION CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fair Credit Reporting Act require a consumer to wait until an inaccurate credit report is disseminated to third parties before the consumer may maintain a cause of action against a credit reporting agency that has refused to delete the inaccurate information or to comply with its obligation to report that the entry is disputed by the consumer?

2. Does the interpretation of "willful" adopted by this Court in *Hazen Paper Company v. Biggins*, 113 S. Ct. 1701 (1993), and prior decisions apply in actions for willful failure to comply with the Fair Credit Reporting Act?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 56 F.3d 469, and is reprinted in the Appendix to this petition at pages A1-A12. The memoranda decisions of the District Court for the Southern District of New York granting respondents' motions for summary judgment and denying petitioner's motion for relief from judgment are not reported and appear at pages A13-A28 of the Appendix.

JURISDICTION

The Court of Appeals for the Second Circuit entered judgment on June 5, 1995. A timely petition for rehearing was denied on September 18, 1995. *See* A29. On November 30, 1995, Justice Ginsburg granted petitioner's request to extend the time to file this petition to and including January 8, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 616 and 617 of the Fair Credit Reporting Act provide:

Section 616. Civil liability for willful noncompliance. [15 U.S.C. § 1681n].

Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of -

(1) any actual damages sustained by the consumer as a result of the failure;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

Section 617. Civil liability for negligent noncompliance.[15 U.S.C. § 1681o].

Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of -

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

STATEMENT OF THE CASE

Two consumer reporting agencies, respondents in this action, issued credit reports that erroneously stated that petitioner had defaulted on his child support obligations. Although petitioner provided the agencies with court orders demonstrating that the entry was wrong, and the creditor who originally reported this alleged debt notified the reporting agencies that the entry was wrong, the reporting agencies failed to correct the error and continued to list the purported debt as an undisputed obligation until petitioner brought suit under the Fair Credit Reporting Act ("FCRA"). To minimize the risk that the erroneous and embarrassing credit reports would be published, petitioner deliberately refrained from applying for credit to purchase a new home until the credit reports were corrected. In the decision below, the Second Circuit held that petitioner's failure to apply for credit when the error continued to appear on his credit report deprived him of any cause of action under the FCRA.

Although the FCRA provides for recovery of "any actual damages sustained by the consumer as a result" of failure to comply with the Act, 15 U.S.C. § 1681o, the Second Circuit held that the Act provides a remedy *only* if the consumer's damages result from publication of derogatory credit information to third parties. In doing so, the Second Circuit acknowledged that its holding is in conflict with *Guimond v. Trans Union Credit Information Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995), in which the Ninth Circuit held that a consumer damaged by violation of the FCRA does not have to endure the publication of derogatory credit information in order to maintain an action under the FCRA. The Second Circuit also held that the evidence that the reporting agencies had not corrected the error or even noted that the entry was disputed was insufficient as a matter of law to sustain a cause of action for "willfully" failing to comply with the Act because the court interpreted this term to require proof of conscious and deliberate disregard for the law.

A. The FCRA

Consumer reporting agencies maintain reports on the credit history and financial status of 90 percent of all Americans.[1] Most of these reports are based on computerized exchanges of information between consumer reporting agencies and banks, finance companies, and other creditors that subscribe to the credit reporting service. Surveys have found that up to 48 percent of credit reports contain one or more errors, and as many as 19 percent contain errors that could adversely affect the consumer's eligibility for credit.[2]

The information in these credit reports is sold to lenders, retailers, prospective employers, and government agencies evaluating a consumer's application for credit or suitability for employment. Consumers are generally not given the opportunity to review the accuracy of credit reports before they are released, nor are they notified when the reports are being requested by and disseminated to third parties. Rather, consumers usually become aware of adverse credit reports indirectly, after the fact, when they are notified that they have been denied credit or employment because of adverse information supplied by a reporting agency.[3]

In 1970, Congress enacted the FCRA to protect consumers against inaccurate reports and provide a remedy against misconduct by credit agencies. *See* 15 U.S.C. §§ 1681-81t. The

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[1] *See* S. Rep. 103-209, 103d Cong., 1st Sess. 1 (1993).

[2] *See id.* at 3; Testimony of Michelle Meier, Consumers Union, in *The Consumer Reporting Reform Act of 1993, Hearings Before the Subcommittee on Consumer Credit and Insurance of the House Committee on Banking, Finance, and Urban Affairs*, 103d Cong., 1st Sess., S. Hrg. 103-80, 206 (1993).

[3] *See* B. Sherland, *The Functions of Consumer Reporting Agencies Under the Fair Credit Reporting Act*, 59 WASH. LAW REV. 401, 403 (1984).

FCRA provides that consumer reporting agencies must "follow reasonable procedures to assure maximum possible accuracy of the information" in credit reports, 15 U.S.C. § 1681e(b), and gives the consumer the right to review the information on the consumer in the reporting agency's files. *Id.* §§ 1681g(a)(1), (2). If the consumer discovers errors in the report, the Act imposes three obligations that petitioner alleges were violated in this case:

First, when the consumer notifies the consumer reporting agency that he or she disputes the completeness or accuracy of any item in the report, the reporting agency must reinvestigate the disputed item and delete the information if it is inaccurate or cannot be verified. *Id.* § 1681i(a).

Second, if the reinvestigation does not resolve the dispute, the consumer may file a statement setting forth the nature of the dispute. *Id.* § 1681i(b). Whenever such a statement of dispute is filed, the consumer reporting agency must clearly note in future reports that the item is disputed and provide either the consumer's statement or a clear and accurate summary of the statement. *Id.* § 1681i(c). The reporting agency may refuse to reinvestigate or to include a consumer dispute statement only if the agency has reasonable grounds to believe that the dispute or the statement "is frivolous and irrelevant." *Id.* §§ 1681i(a), (c).

Finally, the consumer is entitled to know who may have received reports containing the disputed information. If requested, the reporting agency must disclose to the consumer the recipients of any consumer reports the agency furnished for employment purposes during the two years preceding the request, and the recipients of reports furnished for any other purpose during the preceding six months. *Id.* §§ 1681g(a)(3). If requested by the consumer, the reporting agency must also notify any person who has received a copy of the report that the item at issue has been deleted, cannot be verified, or is disputed by the consumer. *Id.* §§ 1681i(d).

If a consumer reporting agency fails to comply with these obligations or other provisions of the Act, the FCRA provides that the agency is liable for "any actual damages sustained by the consumer as a result of" negligent or willful failure to comply with the FCRA. *Id.* §§ 1681n(1), 1681o(1). Punitive damages may be awarded if the consumer reporting agency "willfully fails to comply" with any requirement of the Act. *Id.* § 1681n(2).

B. Inaccurate Credit Reports Concerning Petitioner.

For seven years, from 1982 through 1989, Petitioner Carmine Casella was involved in bitter interstate child custody litigation. App. at A13. At the conclusion of the litigation, the New York State Family Court issued an order confirming that Mr. Casella had fully satisfied his support obligations and, indeed, had overpaid $635.00.

However, in March, 1992, Mr. Casella was denied credit by two banks based on information in credit reports supplied by Trans Union and Equifax Credit Information Services ("Equifax"). App. at A14. The only derogatory entry in the credit reports of both of these agencies was an entry that stated that Mr. Casella had defaulted on his child support obligation and owed $4,350 to the San Diego County Revenue and Recovery Unit. App. at A3, A14. Upon learning of the erroneous reports, Mr. Casella immediately contacted an attorney for assistance in correcting the credit reports. In addition, he stopped his search for a home to purchase because of concern that the adverse credit reports would make it impossible for him to secure a mortgage and that applying for such a mortgage would only promote publication of the erroneous report that he was derelict in his child support obligations.

On April 3, 1992, Mr. Casella's counsel wrote letters to Trans Union and Equifax requesting that the agencies delete the entry stating that Mr. Casella was delinquent in his child support payments. The letter was accompanied by an affidavit by Mr.

Casella, copies of the court orders issued by the New York Family Court, and a letter from the New York Deputy Commissioner of Human Resources confirming that Mr. Casella had fully satisfied the debt over three years earlier. *Id.* The April 3, 1992 letters also requested that the reporting agencies provide the names of any persons to whom the agencies had reported this child support entry in employment, credit or background checks, and that the agencies notify anyone who had received this inaccurate report of the error.

Trans Union responded to this letter by informing Mr. Casella that it had verified the accuracy of the child support entry and therefore would not delete it from his credit report, but invited Mr. Casella to submit a consumer statement regarding the dispute. App. at A3.[4] On June 16, 1992, Mr. Casella's attorney again wrote to Trans Union requesting that it delete the child support entry and he submitted a statement of dispute to be included in Mr. Casella's credit file if the entry was not deleted. App. at A4. Trans Union did not comply with these requests. In July, 1992, Trans Union sent Mr. Casella a report that listed the child support debt as the lead entry in his report and failed to include any indication that this entry was disputed. *Id.* at A3-A4, A15.[5] Trans Union also did not notify persons who had received the report that the child support entry was disputed.

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[4] In the proceedings below, Trans Union stated that it reinvestigated the entry, but it provided no description of its reinvestigation or explanation of how it reconciled the entry with the court orders submitted by Mr. Casella. The only source identified for the "reinvestigation" was an entry on computer tapes automatically loaded into the Trans Union database.

[5] As noted by the court of appeals, the district court erroneously concluded that Mr. Casella did not provide a statement of dispute when the undisputed facts showed that counsel for Casella sent a notarized copy of such a statement to Trans Union on June 16, 1992. *See* App. at A3-A4 and A15, A21.

In response to the April 3, 1992 letter, Equifax initially deleted the entry and sent Mr. Casella a new report indicating that the child support entry had been removed. App. at A3. Equifax had the ability to prevent the entry from reappearing in the credit report by permanently blocking it from its database, but it did not do so. As a result, in May or June, 1992, the child support entry was reinserted into Mr. Casella's credit file by Equifax's automated system for compiling credit reports. *Id.*[6] In July, 1992, Equifax sent Mr. Casella a credit report that corrected other errors identified by Mr. Casella, but once again listed the erroneous $4,350 child support debt, and contained no indication that this entry was disputed. *Id.* at A15. Like Trans Union, Equifax did not respond to Mr. Casella's request that the persons to whom the report had been provided be notified of the error.

After receiving the two July, 1992 credit reports, Mr. Casella convinced the San Diego authorities to delete the erroneous child support entry from their records. On October 28, 1992, the San Diego authorities sent Mr. Casella a letter stating that they were notifying creditors and credit bureaus that the child support entry was an error, but advised that it generally takes credit reporting agencies 30-60 days to correct their records. App. at A4. Mr. Casella continued to refrain from applying for credit during this period.

Equifax and Trans Union deny receiving any such notification from San Diego, *id.*, but this claim is contradicted by an affidavit affirming that on October 14, 1992, San Diego sent "Universal Data Forms" to the reporting agencies directing that the child support entry be deleted. App. at A4, A27. However, the child

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[6] The credit report stated that the item was reported in May, 1992, but Equifax submitted an affidavit stating that the entry was automatically reported by magnetic tape in mid-June.

support entry continued to appear on the computer tapes used to compile the Trans Union and Equifax credit reports.

Neither Trans Union nor Equifax deleted the child support entry. On February 1, 1993, Mr. Casella was preparing to renew his search to purchase a home and requested copies of his credit report from both agencies to verify that the child support entry had been deleted. Both agencies responded by providing Mr. Casella with reports that continued to state that he had defaulted in his child support obligation and gave no indication that this entry was disputed. App. at A15. In June, 1993, Mr. Casella filed for relief under the FCRA. Upon filing of the suit, both agencies immediately acknowledged that the child support entry was inaccurate.

During the fourteen months that he was aware that Equifax and Trans Union included the erroneous child support obligation in their reports, petitioner refrained from submitting applications for credit in order to minimize the risk that the error would be published. App. at A4. As Mr. Casella's affidavit in the proceedings below states:

> I am at the point in my life where I would like to buy a home and settle down for the long haul. I could see no hope of being able to do that if I let it be broadcast about that there exists a claim against me for unpaid child support, no matter how erroneous it might eventually be revealed to be, so I took the only sane and sensible course I could determine, which was not to apply for any more credit anywhere until this matter had been settled and cleared up for good.

Affidavit of Carmine Casella, ¶ 133.

However, shortly before he was notified of the erroneous reports, Mr. Casella had applied for a position with his local volunteer fire department that required a background and credit check. App. at A15. Mr. Casella claimed damages for anxiety

and fear that the accusation that he defaulted on his obligations as a father would be published through dissemination of the erroneous credit reports to neighbors involved in considering his application at the fire department, or to unknown others who may have received the report from the reporting agencies. *Id.* at A8, A23. After suit was filed, Equifax and Trans Union reported that the credit report had not been requested by the fire department or any person after Mr. Casella first notified them of the error in April, 1992. Mr. Casella also claimed damages for loss of the opportunity to secure a mortgage at low mortgage rates during the period that the Trans Union and Equifax failed to correct the child support entry, and punitive damages for the agencies' willful failure to comply with their obligations under the FCRA. *Id.* at A10, A11.

C. The Decision Below.

The district court granted summary judgment for Equifax and Trans Union, *see* App. at A13-25, and denied plaintiff's motion for relief from the judgment based on new evidence showing that San Diego authorities had instructed the reporting agencies to delete the child support entry in October, 1992. *Id.* at A26-28. The court of appeals affirmed on the grounds that Mr. Casella's damages were not compensable under the FCRA. App. at A6.

The court of appeals acknowledged that the FCRA provides that credit reporting agencies are liable for "actual damages" sustained by the consumer as a result of negligent or willful failure to comply with the Act, App. at A6-7 (citing 15 U.S.C. §§ 1681n, 1681o), and that "actual damages" under the Act includes damages for pain and suffering. *Id.* at A8-9. However, the court held that Mr. Casella's claims for pain and suffering were not compensable because they were not caused by dissemination of the erroneous report to third parties, and that he could not recover for loss of opportunity because "he refrained from making any credit applications in order not to tarnish further

his credit history." *Id.* at A10-11. Despite the contrary holding of the Ninth Circuit, the court held that a consumer cannot maintain a cause of action for "actual damages" under the FCRA absent proof of a denial of credit or publication of derogatory information to third persons. *Id.* at A9-10. The court also held that Mr. Casella could not recover the $2,641.83 in attorneys fees he had incurred in notifying the consumer reporting agencies of the error. *Id.* at A7-8.

The court recognized that punitive damages may be available under the FCRA even if the consumer did not incur actual damages. However, the court held that Mr. Casella could not maintain an action for punitive damages because the summary judgment record was insufficient as a matter of law to support the inference that either agency had "willfully" failed to comply with the Act. *Id.* at A11. In doing so, the court cited none of this Court's precedents regarding the meaning of the term "willful," but instead interpreted the willful noncompliance provision of the FCRA to require proof of "'conscious disregard' or 'deliberate and purposeful' actions." App. at A12 (citing *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986), *cert. denied*, 483 U.S. 1022 (1987); *Nitti v. Credit Bureau of Rochester, Inc.*, 375 N.Y.S.2d 817, 821 (Sup. Ct. 1975), and *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 835 (8th Cir. 1976)).

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case concerns a fourteen month-long Orwellian nightmare in which petitioner confronted computerized systems that continued to generate inaccurate reports that he had defaulted on his child support obligations, despite court orders to the contrary, because the reporting agencies refused to intervene and correct the error or even note that the claim was disputed. Congress enacted the FCRA to ensure that consumers caught up in the automated trap that faced Mr. Casella have both tools to force

reporting agencies to behave responsibly, and a right to sue to recover damages where, as here, the reporting agencies disregard their obligations under the Act. The decision below warrants review because it strips away the vital protections Congress conferred on consumers through the FCRA.

The FCRA sets forth a two-tiered liability scheme authorizing consumers to bring an action for actual damages resulting from negligent violations of the Act, 15 U.S.C. § 1681o, and, where the reporting agency "willfully fails to comply" with the Act, an action for punitive damages. *Id.* § 1681n. This liability scheme was designed to give consumers a meaningful remedy if they are wrongly treated by reporting agencies and to provide incentives for reporting agencies to obey the law. In the decision below, however, the Second Circuit held that, because Mr. Cassella wisely sought to avoid the embarrassment and adverse financial consequences of being denied a mortgage for the fourteen months the respondents obdurately refused to correct his credit report, he forfeited his rights to redress under FCRA.

This decision warrants review for three related reasons. First, we cannot overemphasize the damage the Second Circuit's ruling does to the enforcement of the FCRA. Under the ruling below, a consumer is barred from bringing a lawsuit against a reporting agency that refuses to delete an inaccurate item, fails to investigate a claim of error, or even refuses to note that an entry is disputed by the consumer unless the consumer takes the utterly irrational step of encouraging the dissemination of the false and damaging information, and suffering the financial and emotional consequences that flow from the release of such information. That is precisely the Hobson's choice the FCRA was designed to prevent. A consumer who identifies errors in a credit reporting agency report should not be required to have inaccurate, derogatory information published in order to maintain an action to redress the reporting agencies' failure to comply with the statute.

Second, the Second Circuit's ruling that Mr. Casella could not maintain a claim for actual damages conflicts with other Circuit precedent. As the Second Circuit acknowledged, its ruling cannot be reconciled with the Ninth Circuit's decision in *Guimond v. Trans Union Credit Information Co.*, 45 F.3d 1329 (1995), which held that a consumer may maintain an action for actual damages even where the consumer refrains from applying for credit until the erroneous report is corrected. The Second Circuit's ruling is also at odds with the D.C. Circuit's ruling in *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47 (1984), which also held that a claim for damages under the FCRA need not be based on the transmission of inaccurate information to third parties. The Second Circuit's approach also cannot be squared with decisions of the Fifth Circuit and other courts, which have held in cases involving the denial of credit that the consumer may also recover for the pain and suffering associated with the reporting company's failure to correct an erroneous report, precisely the type of damages that the Second Circuit held were not compensable here. *See, e.g., Thompson v. San Antonio Retail Merchants Ass'n*, 682 F.2d 509 (1982). The division among the Circuits is deep and irreconcilable, and warrants this Court's review.

Finally, the Second Circuit's ruling regarding the construction of the term "willful" is in conflict with this Court's interpretation of "willful" in *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993) and other cases where this Court has interpreted the term willful in similar statutes. Particularly alarming is the Second Circuit's decision to adopt a heightened standard for willfulness that requires that the consumer must prove "conscious disregard" or "deliberate or purposeful actions" on the part of the credit agency to prevail on a punitive damage claim. That hurdle will generally be insurmountable, even in a case as egregious as this, because a consumer will rarely be able to show the sort of "deliberate" misconduct described by the Second Circuit in the automated world of credit reporting. The problem here was not

a deliberate scheme to sabotage Mr. Casella's credit, but flagrant indifference to the reporting agencies' obligation to correct errors automatically generated by their computers. Under conventional standards for willfulness, a consumer could prevail on a showing that the credit bureau failed to take reasonable measures to investigate and to correct inaccuracies once the error was brought to its attention. Because the Second Circuit's ruling in this regard is completely at odds with this Court's decisions regarding the proper construction of willful in statutes providing penalties for willful failure to comply, review should be granted.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT IN THE CIRCUITS REGARDING WHETHER DENIAL OF CREDIT OR PUBLICATION OF DEROGATORY CREDIT INFORMATION IS A PREREQUISITE TO AN ACTION FOR ACTUAL DAMAGES UNDER THE FCRA.

One of the principal purposes of the FCRA is to enable consumers to quickly and inexpensively correct the errors that often appear in automated credit reports.[7] However, studies show that consumer reporting agencies often fail to respond to consumer complaints about errors, or delay in reinvestigating and correcting disputed entries. For example, a 1991 study found that consumers who filed complaints with the Federal Trade Commission ("FTC") concerning consumer reports had already complained to the reporting agency for an average of six months

[7] 115 Cong. Rec. 33409 (1969) (remarks of Sen. Proxmire).

without success.[8] Thus, many potential claims under the FCRA involve situations where a consumer reporting agency has ignored a consumer's request that it delete or identify an entry as disputed.

The decision below presents an important conflict among the circuit courts regarding whether consumers in this situation must wait until the erroneous information is disseminated, and suffer the consequences of that dissemination, before they may bring an action for damages under the FCRA. The lower courts have consistently held that the "actual damages" that may be recovered under the FCRA are not limited to out-of-pocket losses, but include any type of compensatory damages, including recovery for humiliation, mental distress and anxiety — even if there are no out of pocket losses.[9] But courts have issued inconsistent decisions on whether recovery is limited to damages caused by denial of credit or publication to third parties. The Second Circuit's holding that a consumer cannot recover for pain and suffering or lost opportunity "when he has failed to show that any creditor or other person ever learned of the derogatory information from a credit reporting agency," App. at A10, is in conflict with decisions in two other circuits.

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[8] S. Rep. 103-209, 103d Cong., 1st Sess. 6 (1993); *see also The Consumer Reporting Reform Act of 1993, Hearings Before the Subcommittee on Consumer Credit and Insurance of the House Committee on Banking, Finance, and Urban Affairs*, 103d Cong., 1st Sess., S. Hrg. 103-80, 432 (1993) (analysis of 1993 complaints found that consumers who complained to FTC had already complained to credit bureau, without satisfaction, for an average of 31 weeks).

[9] *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 151 (5th Cir. 1983); *Thompson v. San Antonio Retail Merchants Ass'n*, 682 F.2d 509, 513 (5th Cir. 1982); *Rasor v. Retail Credit Co.*, 81 Wash. 2d 516, 554 P.2d 1041, 1048-50 (1976).

First, as the Second Circuit recognized, its decision conflicts with *Guimond v. Trans Union Credit Information Co.*, 45 F.3d 1329 (1995). There, the Ninth Circuit explicitly rejected the limitation on recovery adopted in the decision below. As in Mr. Casella's case, the errors in Ms. Guimond's credit report did not result in any denial of credit. The consumer sought damages for lost opportunities because she had been deterred from applying for credit during the months that she was trying to get Trans Union to correct erroneous entries in her credit report, and damages for nervousness, frustration and mental anguish resulting from the incorrect information in her credit report. *Id.* at 1332. The district court granted summary judgment to Trans Union on the ground that no liability could be imposed on a consumer reporting agency absent a denial of credit. *Id.* The Ninth Circuit reversed, and flatly rejected the argument that FCRA liability must be predicated on the denial of credit or transmission of the inaccurate report to third parties. *Id.* at 1333. The Ninth Circuit held that if the consumer's damages resulted from violation of the FCRA, the FCRA provides that they are recoverable, and the causation issue was properly left to the jury. *Id.*

The District of Columbia Circuit has also held that the FCRA does not limit recovery to damages caused by publication to third parties. In *Stewart v. Credit Bureau, Inc.*, 734 F. 2d 47 (D.C. Cir. 1984), the consumer alleged that he was denied membership in the reporting agency as a result of inaccurate information in the reporting agency's files on him, and he sued for damages. *Id.* at 53. The court of appeals rejected the argument that the FCRA does not provide a cause of action for such damages, holding that, if the reporting agency's denial of membership was caused by an inaccurate entry arising from the agency's own violation of the FCRA, "it is compensable as part of the actual damages resulting from [the agency's] negligent violation of the Act." *Id.* at 54.

The Second Circuit's interpretation of the FCRA is also inconsistent with the approach taken in cases where, although there has been a denial of credit, the sole or principal damages are pain and suffering. In such cases, the courts have not imposed any requirement that the damages be limited to compensation for humiliation or embarrassment caused by transmission of the erroneous report to third parties. For example, in *Thompson v. San Antonio Retail Merchants Association*, 682 F.2d 509 (5th Cir. 1982), the consumer suffered no out-of-pocket expenses due to the erroneous credit reports and after the information was corrected, he was denied credit again on other grounds. *Id.* at 512-13 & n.3. Nevertheless, the court affirmed an award of $10,000 in actual damages for humiliation and mental distress because the consumer had spent months urging the reporting agency to cure the error and succeeded in obtaining a correct report only after bringing suit. *Id.* at 514. In other cases, consumers received credit despite an erroneous report, but claimed damages associated with the months they spent getting the reporting agencies to correct the error. In those cases, the courts have allowed damages for pain and suffering that include compensation for precisely the harms that the Second Circuit held are not compensable in this case: the anxiety, emotional distress, and frustration associated with efforts to correct the erroneous report. *See Stevenson v. TRW, Inc.*, 987 F.2d 288, 296-97 (5th Cir. 1993) (approving award of $30,000 for mental anguish); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 834-35 (8th Cir. 1976) (affirming award of $2,500 for loss of sleep, nervousness, frustration, and mental anguish); *Bryant v. TRW, Inc.*, 689 F.2d 72, 75-76 (6th Cir. 1982) (approving award of $8,000 for humiliation, embarrassment, anxiety and emotional distress).

The Second Circuit's ruling also imposes an irrational and self-defeating limitation on the remedies provided under the FCRA. Indeed, under the Second Circuit's ruling, where, as

here, an obdurate reporting agency refuses to correct errors in its automated reports or note a dispute, the consumer is confronted with a Hobson's Choice. If the consumer refrains from applying for credit, he or she is precluded from maintaining any action for damages under the FCRA. If, on the other hand, the consumer applies for credit knowing that the erroneous report will be released, the reporting agency may argue that recovery is barred because the consumer failed to mitigate damages. *See Ladner v. Equifax Credit Information Services, Inc.*, 828 F. Supp. 427, 432 (S.D. Miss. 1993) (consumers have duty to mitigate damages under FCRA). Most importantly, the Second Circuit's ruling requires that to redress the reporting agency's failure to comply with the FCRA, the consumer must impose a self-inflicted injury by encouraging the publication of inaccurate and embarrassing information. This is precisely the type of harm that the FCRA was designed to prevent.[10]

The FCRA itself does not indicate any intent to require that inaccurate credit information be disseminated before a consumer can maintain an action for violation of the act. To the contrary, the language of the Act provides that the consumer reporting agency is liable for "any actual damages sustained by the consumer as a result of" negligent or willful violation of the Act without limitation or qualification concerning the cause. 15 U.S.C. §§ 1681n, 1681o. Accordingly, this Court should review

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[10] The self-inflicted injury to the consumer results not only from publication of the erroneous information in the credit report, but from adding additional information that will injure the consumer's ability to obtain credit. This is so because each inquiry by a creditor is listed in the consumer's credit report and creditors frequently deny credit where the credit history shows frequent inquiries by creditors. Thus, when a consumer is required to apply for credit to maintain an action against the erroneous report, the inquiry will undermine future credit reports, even after the error is deleted, because the inquiry by creditors itself represents derogatory information, particularly where the creditor does not extend credit.

the decision below to resolve the conflict among the circuits on whether the limitation imposed by the Second Circuit is consistent with the Act.

II. THIS COURT SHOULD GRANT REVIEW BECAUSE THE CIRCUIT COURT'S CONSTRUCTION OF WILLFUL FAILURE TO COMPLY UNDER THE FCRA IS INCONSISTENT WITH THIS COURT'S DECISIONS CONCERNING THE INTERPRETATION OF SIMILAR STATUTES.

A consumer confronted with a reporting agency that refuses to delete erroneous information may bring an action for punitive damages under 15 U.S.C. § 1681n, even if there are no actual damages. However, the Second Circuit and a number of other courts have precluded recovery of punitive damages by applying an interpretation of "willfully" that is inconsistent with the standard that this Court has applied in other civil and criminal statutes providing added penalties for willful failure to comply with a statutory obligation. Accordingly, this Court should also grant review to address whether the standard for determining whether a violation is "willful" under the FCRA is the same as that adopted by this Court in interpreting other statutes using this term, or whether a separate, far more exacting standard, is required under the FCRA.

The FCRA provides that punitive damages may be awarded where the consumer reporting agency "willfully fails to comply" with the Act. 15 U.S.C. § 1681n(2). In the decision below, the Second Circuit held that this standard requires proof of "'conscious disregard' or 'deliberate and purposeful' actions." App. at A12. Other FCRA decisions have also construed the "willfully fails to comply" language of the FCRA to require proof

of deliberate disregard for the consumer's rights or other outrageous conduct.[11]

This standard, however, is inconsistent with the manner in which this Court has interpreted "willful" in other criminal and civil statutes. This Court's interpretation of the term "willful" was most recently addressed in *Hazen Paper Company v. Biggins*, 113 S. Ct. 1701 (1993), where this Court reaffirmed its analysis in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). Both cases addressed the interpretation of "willful" in the liquidated damages provision of the Age Discrimination and Employment Act of 1967 ("ADEA"), 29 U.S.C. § 626(b), which is derived from provisions of the Fair Labor Standards Act. 29 U.S.C. § 216(a). The Court observed that the term "willful" was widely used in the law and that, by 1967, it had an accepted judicial interpretation that was well understood by Congress. *See Hazen Paper*, 113 S. Ct. at 1708; *Thurston*, 469 U.S. at 126-27. Based on prior precedents and legislative history, this Court held that the term "willful" requires only that the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Hazen Paper*, 113 S. Ct. at 1710. Moreover, "[o]nce a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant factor rather than a determinative factor in the employment decision." *Id.*; *accord McLaughlin v. Richland Shoe Co.*, 486

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[11] *See, e.g., Stevenson v. TRW, Inc.*, 987 F.2d at 293-294 (only defendants who engaged in willful misrepresentations or concealment are subject to punitive damages); *Pinner v. Schmidt*, 805 F.2d at 1263 (punitive damages award vacated where there is no evidence to suggest that defendant "willfully set out to do" the consumer harm, or "knowingly and intentionally committed an act in conscious disregard for the rights of others.")

U.S. 128, 133 (1988) ("willful" is generally understood to refer to conduct that is not merely negligent).

The same standard should apply under the FCRA. Like the ADEA, the FCRA establishes a two-tiered liability scheme in which actual damages are recoverable for negligent violations, and liquidated or punitive damages are provided for "willful" violations. *See Thurston*, 469 U.S. at 128. Like the liquidated damages for willful violations of the ADEA, damages under Section 1681n(2) are designed to be punitive in nature. *Id.* at 125. Moreover, the FCRA was adopted just three years after the ADEA. In light of this Court's recognition that Congress intended for the term "willful" to have this meaning in the ADEA, the same interpretation should be applied in construing the virtually identical phrase "willfully fails to comply" in the FCRA. Indeed, long before the ADEA and FCRA were passed, this Court held that a statute providing penalties for a person who willfully fails to comply applies where the defendant disregards the statute or is indifferent to its requirements. *See United States v. Illinois Central R. Co.*, 303 U.S. 239, 243 (1938).

If the standard adopted in *Hazen Paper* and *Thurston* is applied under the FCRA, the evidence in this case is plainly sufficient to survive a motion for summary judgment. The record showed that Trans Union did not note that the entry was disputed as required by 15 U.S.C. § 1681i, even after Trans Union received two letters from Mr. Casella's attorney, an affidavit and court orders showing that the obligation had been paid in full, and a formal consumer statement of dispute. The record also contained evidence that San Diego authorities confirmed that the obligation had been satisfied and the entry was in error in October, 1992, but both reporting agencies continued to list the child support entry as an undisputed item.

The Second Circuit rejected the punitive damages claim on the theory that San Diego "was sending mixed signals to Casella,

Equifax, and Trans Union." App. at A12. However, the inconsistent information from San Diego provides no explanation for the reporting agencies' failure to note that the entry was disputed. Moreover, the reporting agencies' decision to continue to report the child support obligation as an undisputed entry when they had received contradictory information from the creditor concerning its accuracy shows a reckless disregard for the agency's obligations to reinvestigate and ensure the accuracy of their reports. *See, e.g. Stevenson v. TRW, Inc.*, 987 F.2d at 293 (reporting agency has responsibility to evaluate information from creditors when reinvestigating a disputed item); *Swoager v. Credit Bureau of Greater St. Petersburg*, 608 F. Supp. 972, 976 (M.D. Fl. 1985) (reporting agency is not permitted to report whatever information creditor furnishes without question when agency knows item is disputed).

The combined effect of the Second Circuit's interpretation of "willful" and its ruling on actual damages preclude any remedy under the FCRA in many cases where the reporting agency obdurately fails to comply with the Act. Where, as in this case, a consumer is confronted by a reporting agency that refuses to delete an erroneous item or include a dispute statement, the ruling below provides that a consumer does not have a cause of action for actual damages under Section 1681o unless the erroneous credit report is transmitted to third parties, and cannot maintain an action under Section 1681n based on the evidence that the reporting agency has recklessly failed to comply with its obligations under the FCRA. This result undermines the ability of consumers to correct the errors that frequently occur in the automated reports compiled by reporting agencies, and merits review by this Court.

CONCLUSION

For the reasons stated above, the Court should grant the petition for certiorari.

Respectfully submitted,

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January 5, 1996

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 789 -- August Term 1994

Argued: February 23, 1995 Decided: June 5, 1995

Docket No. 94-7547

CARMINE CASELLA,
APPELLANTS

v.

EQUIFAX CREDIT INFORMATION SERVICES,
AND TRANS UNION CORPORATION,
APPELLEES

Before: NEWMAN, *Chief Judge*, VAN GRAAFEILAND AND COFFIN,* *Circuit Judges*.

Appeal from the May 11, 1994, judgment and July 27, 1994, order of the United States District Court for the Southern District of New York (Gerard L. Goettel, Judge) denying plaintiff's motion for partial summary judgment, granting defendant's motion for summary judgment, and dismissing a complaint seeking damages under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (1988).

Affirmed.

James B. Fishman, New York, N.Y.
(Jerome Greenberg, New York, N.Y., on the brief),
for plaintiff-appellant.

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*The Honorable Frank M. Coffin of the United States Court of Appeals for the First Circuit, sitting by designation.

Kenneth A. Becker, New York, N.Y.,
(Richard R. Lutz, James M. Hershler, Townley & Updike, New York, N.Y., on the brief), for defendant-appellee Equifax Credit Information Services.

Mark E. Kogan, Marion, Satzberg, Trichon & Kogan, Philadelphia, Pa., for defendant-appellee Trans Union Corporation.

JON O. NEWMAN, *Chief Judge*:

This appeal from a grant of summary judgment in favor of two credit reporting agencies requires us to consider the types of injury that can justify a damages award under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (1988) ("FCRA"). Plaintiff Carmine Casella appeals from the May 11, 1994, judgment of the District Court for the Southern District of New York (Gerald L. Goettel, J.) denying his motion for partial summary judgment, and granting the motions of defendants-appellees Equifax Credit Information Services ("Equifax") and Trans Union Corporation ("Trans Union") for summary judgment as to all claims, dismissing the complaint. Casella also appeals from the subsequent order of the District Court, dated July 27, 1994, denying his motion for partial relief from the judgment, brought pursuant to Fed. R. Civ. P. 60(b)(2). For the reasons stated below, we affirm the judgment and post-judgment ruling of the District Court.

BACKGROUND

In June 1993, Casella brought this action against Equifax and Trans Union claiming various violations of the FCRA, including 15 U.S.C. §§ 1681c, 1681i(c), and 1681g(a)(3)(A). Casella alleged, in substance, that appellees had prepared a credit report containing false and defamatory information, and that they had refused either to delete the information or to include a statement of dispute in his credit file after he notified them of the inaccuracy.

In March 1992, following the denial of his applications for credit cards at two banks, Casella obtained copies of his credit reports from Equifax and Trans Union, which contained an entry indicating that he had a past due child support obligation in the amount of $4,350 owing to the San Diego County (California) Revenue & Recovery Unit ("San Diego"). Upon receiving those reports, Casella notified appellees that he disputed the accuracy of the San Diego item and provided documentation from the New York State Family Court indicating that the support obligation had been terminated. He also requested that until the matter with San Diego was resolved, appellees include a statement of dispute in his credit report and provided each appellee with a notarized copy of such statement.

Upon receiving Casella's notification, Equifax deleted the disputed entry. As a result, it did not include appellant's statement of dispute in his credit file. One month later, however, the San Diego entry reappeared in Casella's file. Equifax attributes the reappearance to the fact that San Diego again reported the information. Equifax maintains a computerized database composed largely of accounts receivable information supplied monthly by its subscribers on magnetic computer tapes. According to Equifax, when the tapes are loaded into its database, account information is automatically included in a consumer's credit file. Thus, when San Diego continued to report that Casella had a past due obligation, that information was entered in appellant's credit file. Although appellant received updated credit reports from Equifax in July 1992 and February 1993, he did not again notify the company of the inaccurate information from San Diego.

The situation with Trans Union was different. Instead of deleting the disputed entry, as Equifax did, Trans Union investigated the dispute. When the San Diego authorities confirmed the accuracy of the entry, Trans Union informed Casella that it would continue to report the obligation. It did not, however, include a statement of dispute in appellant's file. The

District Court apparently thought that appellant had not provided Trans Union a statement of dispute. The record reflects, however, that on June 16, 1992, counsel for Casella requested that a consumer statement be added to appellant's file and sent a notarized copy of a 100-word statement to Trans Union. After receiving updated credit reports, Casella did not again notify Trans Union that he disputed the accuracy of the San Diego entry or request again that the statement of dispute be included in his file.

In the meantime, Casella sought to resolve his dispute directly with San Diego. On October 28, 1992, San Diego informed appellant that he had a zero balance and indicated that it would notify creditors. Equifax and Trans Union deny ever having received notification. In support of his motion for partial relief from the judgment pursuant to Fed. R. Civ. P. 60(b)(2), however, appellant provided copies of two Universal Data Forms, dated October 9, 1992, and February 4, 1993, purporting to transmit delete instructions to both appellees regarding the San Diego item. On November 2, 1992, San Diego wrote to appellant again, this time advising him that he still owed child support. In December 1992, San Diego reported to Equifax and Trans Union that Casella's child support obligation was past due.

The evidence was undisputed that during the period in which appellees reported the San Diego item in Casella's credit file, he did not apply for, and was never denied, any credit. Appellant contends, however, that he refrained from applying for any new credit out of fear that he would be rejected.

After Casella filed his complaint against Equifax and Trans Union, both defendants moved for summary judgment. Casella cross-moved for summary judgment on his claim that appellees had violated 15 U.S.C. § 1681i(c), by failing to include a dispute

statement in any subsequent credit report.[1] The District Court denied Casella's motion and granted appellees' motion for summary judgment as to all claims. In so ruling, it considered five issues. First, the Court examined whether appellees had violated 15 U.S.C. § 1681c, by including obsolete data in Casella's credit report.[2] It concluded that the evidence was insufficient to support that claim. Next, the Court considered whether appellees' investigations of the disputed item in Casella's report were sufficient, and ruled that as a matter of law both appellees had acted "reasonably." Turning to appellant's claim for violations of 15 U.S.C. § 1681i(c), the Court found that under the circumstances, appellees were not required to include a statement of dispute in appellant's credit file.

The Court next concluded that Casella had not satisfied his burden of showing that he had suffered any damages as a result of Equifax's or Trans Union's conduct. The District Court rejected Casella's assertions that he was injured because (a) he was discouraged from applying for mortgage loans because the San Diego item was in his credit report and (b) he suffered great emotional distress. In the Court's view, Casella had not shown that appellees, rather than San Diego, were the cause of his

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[1] Section 1681i(c) provides that:
Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.

[2] 15 U.S.C. § 1681c provides that
(a) Except as authorized under subsection (b) of this section, no consumer reporting agency may make any consumer report containing any of the following items of information:
. . .
(6) Any . . . item of information which antedates the report by more than seven years.

injuries. Appellant had also failed to present any evidence of willful noncompliance with any provision of the FCRA, *see* 15 U.S.C. § 1681n, and thus, punitive damages were inappropriate. Finally, the Court determined that appellant had not presented evidence of either libel or wrongful communication to another credit reporting agency.

Following the District Court's decision and after he filed his notice of appeal in this Court, appellant moved in the District Court for partial relief from the judgment on the grounds of newly discovered evidence. That evidence, as noted above, consisted of two Universal Data Forms accompanied by affidavits from San Diego indicating that appellees had in fact been notified that they should delete the San Diego item. On the basis of this evidence, Casella argued that the District Court's finding that appellees had not acted willfully was erroneous. The District Judge denied Casella's motion on the grounds that (a) the evidence was cumulative, (b) even if not cumulative, it would not have changed the outcome of the case, and (c) the evidence offered could have been discovered earlier with due diligence.

On appeal, Casella raises a host of issues, but because we agree with the District Court that Casella has utterly failed to produce any evidence constituting damages under the FCRA, we need reach only that issue in affirming the judgment of the District Court.

DISCUSSION

The FCRA creates a private right of action against credit reporting agencies for the negligent, *see* 15 U.S.C. § 1681*o*, or willful, *see id.* § 1681n, violation of any duty imposed under the statute. *See Cahlin v. General Motors Acceptance Corp.*, 936 F.2d 1151, 1156 (11th Cir. 1991). For any such violation, the credit reporting agency is liable to the consumer for "actual damages" sustained, the costs of the action together with

reasonable attorney's fees and, in the case of willful noncompliance, punitive damages. *See id.* §§ 1681n, 1681*o*.

In this case, Casella bears the burden of proving actual damages sustained as a result of appellees' activities. Seeking to meet that burden, he offered in the District Court three types of damages he alleges were sustained as a result of Equifax's and Trans Union's conduct. Those damages include (1) out-of-pocket attorney's fees, (2) pain and suffering, and (3) loss of opportunity in the home mortgage market. We consider each category of damages and conclude that none of them amounts to compensable damages sufficient to withstand a motion against appellant for summary judgment.

1. *Out-of-pocket attorney's fees.* Appellant argues that he incurred out-of-pocket attorney's fees paid in the course of challenging the inclusion by appellees of the San Diego entry in his credit reports. The District Court did not rule on this aspect of appellant's damages. However, it is clear that as a matter of law, Casella would not be able to recover this element of his damages in an action under 15 U.S.C. §§ 1681n or 1681*o*.

The term "actual damages" may include out-of-pocket expenses for attorney's fees incurred by a plaintiff prior to litigation of his FCRA claims. *See, e.g., Thomas v. Trans Union Credit Information Co.*, 1992 WL 280516, at *4 (N.D. Ill. Oct. 5, 1992). The rationale behind this rule is that a consumer should not have to retain an attorney in order to force compliance with the statute. By the same token, however, prelitigation expenses to retain a lawyer should not be compensable where, as in this case, the lawyer's services were not employed to remedy any violation of the law.

The only evidence Casella presented of his prelitigation expenses is an affidavit of his attorney stating that the attorney charged, and appellant paid, $2,641.83 in connection with letters prepared and sent to Equifax and Trans Union in April 1992, and again to Trans Union in June 1992. These letters were for the purpose of

notifying appellees that Casella disputed the accuracy of the San Diego entry and to request the inclusion of statements of dispute in Casella's credit report.

Prior to being notified by a consumer, a credit reporting agency generally has no duty to reinvestigate credit information. *See, e.g.*, 15 U.S.C. § 1681i(a); *Swoager v. Credit Bureau of Greater St. Petersburg*, 608 F. Supp. 972, 975 (M.D. Fla. 1985); *see also McPhee v. Chilton Corp.*, 468 F. Supp. 494, 498 (D. Conn. 1978). Moreover, the credit reporting agency need not include a statement of dispute in a consumer's report until the consumer provides one. *See* 15 U.S.C. § 1681i(c). It is obvious, therefore, that neither Equifax nor Trans Union violated the FCRA *before* they were contacted by Casella in April and June 1992. Appellant's expenses incurred merely to notify appellees of inaccurate credit information, and not to force their compliance with any specific provision of the statute, cannot be compensable as "actual damages" for a violation of the FCRA.

2. *Pain and suffering.* Appellant next contends that he sustained actual damages in the form of pain and suffering, resulting from appellees' inclusion in his credit report of the erroneous San Diego item. In support of this claim, he offered his own affidavit, and that of his companion, Patricia Klees, explaining at length the worry, anxiety, and depression he felt while having to deal with his credit report, which stigmatized him as a "deadbeat father." That anxiety, according to appellant, was exacerbated by the fact that he had applied for a position in the Suffern, New York Volunteer Fire Department – an application, he feared, that might involve a background and credit check. Casella was ultimately accepted into the Volunteer Fire Department. Nevertheless, he argues that he suffered severe emotional distress during the pendency of his application.

In granting appellees' motion for summary judgment, the District Court properly recognized that "actual damages" may include humiliation and mental distress, even in the absence of out-

of-pocket expenses. *See Guimond v. Trans Union Credit Information Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995); *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 151 (5th Cir. 1983); *Thompson v. San Antonio Retail Merchants Association*, 682 F.2d 509, 513 (5th Cir. 1982); *Bryant v. TRW, Inc.*, 487 F. Supp. 1234, 1240 (E.D. Mich. 1980), *aff'd*, 689 F.2d 72 (6th Cir. 1982). The Court concluded, however, that appellant was not entitled to pain and suffering damages in this case, because he had failed to show that his emotional distress was caused by Equifax and Trans Union, as opposed to San Diego. Thus, appellant's claims were apparently rejected due to a lack of causation between the harm alleged by Casella and appellees' alleged violations of the FCRA. *See Cahlin, supra*, at 1161; *Hauser v. Equifax, Inc.*, 602 F.2d 811, 816 (8th Cir. 1979). We think this was proper.

Casella presented no evidence that during the period in which Equifax and Trans Union carried the inaccurate San Diego entry, either of them provided appellant's credit report to any third party. No rational trier of fact could infer from this record that any potential creditor or other person in appellant's community learned of any harmful information from appellees. Casella's argument boils down to the bare contention that he is entitled to damages for pain and suffering simply because he *knew* of an inaccurate and potentially damaging item in his credit report. We are unaware of any case extending FCRA damages that far, *cf. Stevenson v. TRW, Inc.*, 987 F.2d 288, 297 (5th Cir. 1993) (plaintiff was denied credit three times and experienced considerable embarrassment from having to discuss his problems with business associates and creditors); *Pinner v. Schmidt*, 805 F.2d 1258, 1265 (5th Cir. 1986) (embarrassment resulting from three credit denials and from lengthy dealings with credit bureau), *cert. denied*, 483 U.S. 1022 (1987); *Thompson, supra*, at 513-14 (humiliation and embarrassment suffered from three denials of credit and fact that credit bureau took several months to correct credit report's inaccuracies); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829,

834 (8th Cir. 1976) ("considerable time spent fighting O'Hanlon's grossly inaccurate reports"), and we decline to reach that result here.

In rejecting Casella's claim for pain and suffering, we note that at least one court has recently held that a cause of action exists under the FCRA even absent a denial of credit. *See Guimond*, *supra*, at 1333. Whether or not we would agree with *Guimond*, we do not believe a plaintiff can recover for pain and suffering when he has failed to show that any creditor or other person ever learned of the derogatory information from a credit reporting agency. Appellant has not met his burden of presenting evidence that Equifax or Trans Union caused his pain and suffering.

3. *Loss of opportunity*. The third type of damages appellant claims he suffered is a loss of opportunity in the home loan mortgage market. The substance of that claim is that as a result of appellees' erroneous credit reports, Casella lost the opportunity to take advantage of low mortgage interest rates and low housing prices prevailing during the period in which appellees carried the derogatory San Diego information. Appellant submitted evidence that in 1992, he and his companion were actively seeking to purchase a home, and that at various times during that year they had sufficient resources to obtain an 80 percent home mortgage in Casella's community. Casella concedes, however, that at no time during the relevant period did he actually make an offer to purchase a home, or apply for a mortgage. Instead, he claims, he refrained from making any credit applications in order not to tarnish further his credit history.

Whether or not Casella had the wherewithal to obtain a mortgage, the District Court properly found that, in the absence of any evidence that appellant made an offer to purchase property or applied for a home mortgage, the "lost opportunity" damages he alleged were too speculative. Though appellant cites cases suggesting that loss of opportunity in the mortgage market or a delay in obtaining credit resulting in less favorable terms may

constitute compensable damages under the FCRA, *see Bryant v. TRW*, 689 F.2d at 79; *Kreger v. United Credit Services, Inc.*, 1992 WL 414653 (Wis. App. Nov. 25, 1992) (unpublished disposition), we do not find those circumstances present here. *Kreger* involved an attempt by plaintiff to refinance a mortgage he already held. *See id.* at **1. Moreover, there was specific evidence in *Kreger* that a particular bank might have issued a new loan, absent plaintiff's negative credit report. *See id.* at **2. In this case, by contrast, Casella identified no bank that was interested in giving him a home mortgage. Indeed, as noted above, he presented no evidence that any potential creditor bank even received his credit report. Under the circumstances, appellant has completely failed to meet his burden of demonstrating any damages resulting from being deprived of a loan. *See Ladner v. Equifax Credit Information Services*, 828 F. Supp. 427, 432 (S.D. Miss. 1993) (plaintiff withdrew her application for a loan and never reapplied).

4. *Punitive damages*. Casella further argues that even if he is not entitled to any "actual damages," he still may be entitled to punitive damages on the theory that Equifax and Trans Union willfully violated various provisions of the FCRA. *See* 15 U.S.C. § 1681n. As appellant carefully points out, punitive damages may be available even where a plaintiff has sustained no actual damages. *See* 15 U.S.C. § 1681n(2); *Boothe v. TRW Credit Data*, 557 F. Supp. 66, 71-72 (S.D.N.Y. 1982). The District Court found that appellant had presented no evidence that either Equifax or Trans Union acted willfully in failing to delete the San Diego entry or to include appellant's statement of dispute in his consumer credit file. Thus, the Court concluded, Casella could not receive punitive damages. We agree that the record is devoid of any evidence supporting a theory of willful noncompliance.

Nor does the evidence Casella presented on his Rule 60(b) motion alter our conclusion. The newly discovered evidence consisted of two Universal Data Forms that apparently transmitted delete instructions to appellees in October 1992 and February

1993. The evidence also demonstrated, however, that San Diego re-reported the past due child support obligation to appellant in November 1992, and to appellees in December 1992. Throughout the relevant period, San Diego was sending mixed signals to Casella, Equifax, and Trans Union. This course of conduct does not support the kind of "conscious disregard" or "deliberate and purposeful" actions necessary to make out a claim for willful noncompliance under the FCRA. *See Pinner v. Schmidt*, *supra* at 1263 (vacating award of punitive damages); *Nitti v. Credit Bureau of Rochester, Inc.*, 375 N.Y.S.2d 817, 821 (Sup. Ct. 1975) (awarding punitive damages when "[t]ime and again plaintiff came to defendant's office and went over the same credit information . . . all to no purpose"); *Millstone*, *supra*, at 835 (awarding damages where defendant "trampl[ed] recklessly upon Millstone's rights").

The District Court did not abuse its discretion in rejecting appellant's Rule 60(b) motion on the ground that the evidence offered, even if "newly discovered," would not have resulted in a different outcome on summary judgment.

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CARMINE CASELLA, *Plaintiffs,* v. EQUIFAX CREDIT INFORMATION SERVICES and TRANS UNION CORPORATION *Defendants.*	MEMORANDUM DECISION 93 civ 3867 (GLG)

This case is a dispute over a delinquency item in a credit history. Plaintiff Casella alleges that a false and inaccurate item was included in his history as compiled by defendant credit reporting agencies, Equifax Credit Information Services and Trans Union Corp., in violation of U.S.C.A. § 1681 of the Fair Credit Reporting Act (FCRA).

BACKGROUND

The credit history item underlying this case arose from plaintiff's six years of litigation in New York, from 1982 through 1989, of an interstate child support matter. That litigation apparently involved a lengthy divorce proceeding, a move by plaintiff's wife to California from New York with their three children, and attempts by a California agency to collect certain monies from plaintiff. He has described the litigation long, ugly and bitter. The culmination of the action was a disposition in the plaintiff's favor with access to that suit's court file limited to plaintiff and New York's Corporation Counsel.

Defendants Equifax and Trans Union are unrelated competing companies that for "monetary fees . . . regularly engage [ ] in . . . the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of

furnishing consumer reports to third parties, and which use [ ] any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports" as defined in 15 U.S.C.A. § 1681a(f) as consumer credit reporting agencies.

Very early in 1992 plaintiff applied for credit cards from the Ohio Savings Bank and the Monogram Bank. On or about March 3, 1992, plaintiff's application was rejected by Monogram which stated that plaintiff had made "too many recent requests for credit," and cited Trans Union for its information. On or about March 11, 1992, Ohio Savings also rejected his application stating: "housing type does not indicate stability, derogatory records present and delinquent credit obligations." Ohio Savings Bank used Equifax as its source of information. In response to plaintiff's requests, Trans Union and Equifax sent his credit reports to him.

The Trans Union report indicated that an account with "San Diego Co." was placed for collection. The Equifax report stated that "Sandiegoco" held a collection account for "child\family support obligation" (This was apparently represented monies that San Diego County expended on plaintiff's family while the support proceedings were before the court in New York.) In each report that account was the sole derogatory item. Plaintiff attests that he was very upset by the delinquency item and wondered at the time if San Diego was "trying some rogue action to get the money New York State Family Court told them to forget about collecting."

At the beginning of April 1992, plaintiff retained counsel and sent letters disputing the San Diego item to defendants. Together with those letters, plaintiff attached copies of 1988 New York Family Court Orders in the matter of "DSS of San Diego o/b/o Marie Casella vs Carmine Casella" which indicated that San Diego's claim was extinguished and a one page affidavit challenging the truth of the "Sandiegoco" entry.

In response, Equifax deleted the disputed item from plaintiff's credit file and sent copies of the revised file to him on or about June 12, 1992. Trans Union, in response to its letter,

reinvestigated the item. San Diego County confirmed the accuracy of the derogatory entry and its confirmation was relayed to plaintiff by a letter from Trans Union. The letter also informed plaintiff that he could include in his file a 100 word statement disputing his delinquency entry. There is no indication that plaintiff sent such a statement.

During this time, plaintiff had been waiting for word on his application for membership in the volunteer fire department of his town. He had applied at the beginning of March and was accepted to the squad at the beginning of June 1992.

Also at the beginning of June 1992, plaintiff contacted the San Diego Family Support division and was told that his case was still open. Plaintiff, after overcoming some difficulties due to access restrictions to the New York court records, obtained certified copies of his litigation orders and sent them to San Diego.

About July 23, 1992, plaintiff received updated copies of his Trans Union and Equifax credit files. Trans Union's report still contained the San Diego item and, to plaintiff's surprise, so did Equifax.

Meanwhile, plaintiff continued his efforts to correct the item at its source, San Diego. Finally, in October 1992, the San Diego agency, now named the Revenue and Recovery Department, agreed to update its records to show the delinquency item's withdrawal and to notify the reporting agencies of the change. However, there is no evidence that the agency or plaintiff notified the defendants of the agency's actions.

In February 1993, plaintiff requested copies of his credit reports from defendants and, when he found the San Diego County item still in them, filed the present action in June 1993.

ISSUES

Plaintiff alleges defendants violated the FCRA when they: 1) included and disseminated a false and defamatory credit item in plaintiff's credit report, 2) failed to delete said item after they were

given proof of its inaccuracy, 3) refused to disclose what prospective employers had been sent in plaintiff's credit report, 4) refused to include in plaintiffs credit report his statement disputing the item, and 5) caused TRW Credit Reporting Services to list the item. Plaintiff also makes a state claim of libel and defamation. He seeks compensatory and punitive damages. Plaintiff further asserts that the disputed item was improperly included because it was obsolete.

Defendants contend that the item, even if it were unjustified, was nevertheless accurately included in Casella;s history as reported to Defendants by the San Diego governmental agency. They further contend that, once they were informed of the item's disputed truth, it was treated reasonably and correctly.

Plaintiff now moves for partial summary judgement, arguing that defendants violated section 1681i(c) by not including in plaintiff's credit report his statement disputing the item.

Defendants have also moved for summary judgement. They assert that plaintiff, because he did not apply for any credit and thus was not denied any credit, cannot demonstrate that he suffered any damage attributable to their inclusion of the incorrect item. Hence, they argue, any assertion by plaintiff is purely speculative. Furthermore, they argue that libel requires a communication of falsehood which did not occur here.

DISCUSSION

This cases requires the examination of five issues 1) inclusion of obsolete data in violation of Section 1681c, 2) sufficiency of defendant's investigations, 3) inclusion of plaintiff's dispute of statement, 4) damages, and 5) libel.

Inclusion of Obsolete Data

Section 1681c in relevant part states: "no consumer reporting agency may make any consumer report containing any of the following items of information: . . . (4) Accounts placed for collection . . . which antedate the report by more than seven years

. . . (6) Any other adverse item of information which antedates the report by more than seven years."

The San Diego delinquency was reported to defendants as arising from a "data opened" of 01/87, five years before its inclusion in plaintiff's credit report. Although New York Family Court stated that "the order was terminated effective Jan. 31, 1983," such statement was made in its order of April 29, 1988. Hence, San Diego's claim dated from the beginning of 1987 and the claim was not actually extinguished until 1988. Measuring from either date, the requisite seven years had not elapsed at the time plaintiff began this action to mandate statutory obsolescence.

Sufficiency of Defendant's Investigations

Plaintiff asserts that defendants were negligent in their procedures to assure accuracy of credit items and did not reinvestigate disputed items sufficiently.

Defendants argue that the delinquency claim as entered was accurate before plaintiff challenged its validity. They argue that their procedures are reasonable.

Before defendants were initially informed by plaintiff, they could not have found information to counter the derogatory item in their process of verifying adverse material received, particularly in light of the sealing of the New York court records. Considering the source of the information, a government agency, defendants had no reason to doubt the source's veracity. In a similar case *McPhee v. Chilton Corp.*, 486 F.Supp 494 (D.Conn. 1978), the court held that a credit reporting agency did not violate FCRA when the agency noted in the consumer's credit report only his filing of a petition of bankruptcy without adding any information about the filing's outcome. Mr. McPhee's bankruptcy petition was made and then withdrawn shortly afterwards. A mortgage application by Mr. McPhee that was denied alerted him that follow up information about the petition was missing from his credit report.

The court in *McPhee* held that:

> By including such information, the report might have been "more accurate than it was" [in that it] might have noted that the petition had been withdrawn, or in different circumstances that a full adjudication of bankruptcy had occurred. But unless that information was available at the time the agency first learned that a petition for bankruptcy had been filed . . . so that the agency could find the information in the reasonable process of verifying adverse material as received, the agency could not be charged . . . for the omission of later developments.

Id. at 498 (citations omitted).

Similarly, in this case information about plaintiff's successful litigation of the San Diego claim in New York was unavailable to defendants at the time the agencies first learned of the debt liquidation. From all that appears, even San Diego County was unaware of the sealed New York court order. Hence, defendants' inclusion of the San Diego claim before plaintiff's notification to them was unobjectable under the FCRA.

After notification, Equifax asserts that they immediately deleted the item and only reentered it when San Diego again reported the claim. They contend that, had plaintiff reasserted his dispute, the item would have been removed again.

The record shows that Equifax did promptly delete the disputed delinquency upon petition by plaintiff. Later, when San Diego County again reported the delinquency, Equifax reentered it in plaintiff's credit file. In light of Equifax's unquestioning deletion of the delinquency item the first time plaintiff complained, essentially taking plaintiff's position without investigation, there is no reason to doubt that they either would have similarly deleted the item if the plaintiff had complained a second time or investigated at such time. However, plaintiff never made such a second complaint to Equifax. He chose to break off communications with Equifax, apparently to deal with the problem at its source: San

Diego County. Therefore, under these circumstances, Equifax investigated reasonably and sufficiently.

Trans Union took a different tack, choosing to ask the San Diego agency directly to verify the electronic data transmission. It received a confirmation of the delinquency's validity. Trans Union then notified plaintiff of San Diego's position and gave him an opportunity to insert a statutorily mandated 100 word statement in his report to counter the derogatory claim.

We find that Trans Union's procedure is reasonable and sufficient to assure accuracy. When the delinquency item was disputed, Trans Union verified it through a different confirmatory source (inquiry to a person at the state agency itself) from the original transmission source (mass electronic data). Upon confirmation, Trans Union notified the consumer, informed him of the claim's origin, and gave him the opportunity to insert a countervailing argument into his credit report.

Trans Union's investigation procedure would either determine the validity of the claim or set out the two sides of the claim's dispute under ordinary circumstances where the transaction or record in dispute was between the consumer and the creditor directly. The disputed delinquency claim in this case, however, presented defendants with an extraordinary situation where the consumer was asserting that a third party had absolved the claim. Plaintiff was asserting that San Diego's claim had been extinguished by a New York court.

The defendants were faced with contradictory assertions that could not be reasonably resolved from their exchange of correspondence with plaintiff, since in each case plaintiff cut short the correspondence. Plaintiff argues that both defendants should have asked the New York court directly to resolve the dispute.

However, defendants had no duty to investigate and resolve what in essence is a legal or bureaucratic dispute underlying a creditor claim. In this case, we cannot expect defendants to have declared San Diego's claim invalid. Expecting credit reporting

agencies to independently police the validity of state claims would burden commercial dealings beyond any currently required legislative mandate.

A further consideration is that, although defendants did report information that ultimately had no legal basis, the information was accurate at the time of reporting. At that time the San Diego County Family Support Division's position was that plaintiff was delinquent. Its overruled but uncontested claim caused more than just the derogatory credit item on plaintiff's credit reports: the Internal Revenue Service seized plaintiff's 1991 tax refund for application to San Diego County's claim. Defendants were not informed, either by plaintiff or San Diego, of the County's withdrawal in October 1992 of the delinquency item. Without notification, defendants reasonably considered the dispute resolved some five months earlier when San Diego had confirmed plaintiff's delinquency.

Inclusion of Defendant's Statement

Section 1681i states in relevant part:

> (b) If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The consumer reporting agency may limit such statements to not more than one hundred words if it provides the consumer with assistance in writing a clear summary of the dispute.
>
> (c) Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.

Equifax considered the dispute resolved by San Diego's retransmission of plaintiff's delinquency and hence outside the

requirement of the section. Upon plaintiff's challenge of the delinquency item, Equifax deleted it without consideration of San Diego's position. Then, when San Diego reported it again, Equifax reentered the item on plaintiff's credit file. Plaintiff never challenged the item's reappearance. Without such challenge, Equifax could not reasonably be expected to know of the ongoing dispute between plaintiff and San Diego. Hence, Equifax could not have been expected that the inclusion in his credit report of a statement from plaintiff was necessary.

Trans Union knew of plaintiff's dispute but considered its offer to include a 100 word statement an adequate interpretation of the statutory requirements of Section 1681i. Plaintiff did not respond with such a statement, arguing instead that Trans Union should have included the one page affidavit he previously sent. But the affidavit was not "a brief statement setting forth the nature of the dispute" as mandated by the statue.

Plaintiff in this case had assistance of counsel from the beginning. Hence, plaintiff was not ignorant of the meaning of the statue or his rights under it. He chose not to pursue his rights. Instead, plaintiff ceased correspondence with Trans Union and turned his efforts towards correcting San Diego's position. Under these circumstances, Trans Union did not violate the stature by not including in his credit report plaintiff's lengthier affidavits as substitutes for the statutory 100 word statement.

Damages

The court in *Morris v. Credit Bureau of Cincinnati*, 563 F. Supp. 962 (S.D. Ohio, 1983), succinctly stated the four elements plaintiff must meet in order to recover under 15 U.S.C. § 1681:

1. Defendant was negligent in that it failed to follow reasonable procedure to assure maximum possible accuracy of information about the plaintiff;
2. Defendant reported inaccurate information about the plaintiff:

3. Plaintiff was injured; and

4. Defendant's negligence was the proximate cause of such jury.

Id. at 967, (citations omitted).

Defendants argue that as to the third element, plaintiff has not given any evidence of injury and thus, they argue, summary judgement is appropriate for all claims.

Defendants argue that plaintiff was never denied credit because of the disputed delinquency item. Although two applications for credit cards were denied, one denial indicated that the derogatory item was only one of two reasons for rejecting plaintiff. The other denial was for another reason entirely. The record indicates plaintiff possessed approximately ten other credit cards, and thus their is an issue of whether denial of another credit card has injured him. Plaintiff has not presented evidence that the denial of the Ohio Savings or Monogram Bank credit cards caused him any injury. Indeed, the record shows that defendant received increased credit limits on several of his other credit cards during the period of this case. Moreover, the two denials *preceded* plaintiff's initial notification to defendants. Since defendants were not even arguably negligent *before* they received plaintiff's initial notice, the denials of credit cannot be blamed on defendants.

Plaintiff primarily asserts that he was discouraged from applying for mortgage loans because of the presence of the delinquency item in his credit reports. Although he gives evidence that he was considering the possibility of seeking a mortgage by his having attended informal seminars, at no time did he make an offer to purchase property or an application for a mortgage. Defendants argue persuasively that it is too speculative to consider what would have been the result had he applied. They argue further that the question is even more speculative whether any mortgage application rejection would have been proximately caused by the disputed delinquency if he had applied. Hence, plaintiff cannot

show that any out-of-pocked losses were caused by the inclusion of the disputed delinquency item.

Actual damages also include humiliation or mental distress, even it the consumer suffered no out-of-pocket losses. *Fischl v. General Motors Acceptance Corp.*, 798 F.2d 143, 151 (5th Cir. 1983).

The affidavits of plaintiff and his companion show that Mr. Casella suffered great emotional distress from the original Family Court litigation, becoming depressed and moody. Although he understandably was very upset by the appearance in his credit report of an item he thought had been banished to his past, the record shows that he was angry at San Diego for continuing to assert its claim, not at the credit agencies reporting the item.

Plaintiff argues that he was caused pain and suffering by the delinquency item on his credit reports. In his affidavit, he "wonder[ed] if San Diego was trying some rogue action." Plaintiff claims that his "nerves were shot, [his] attitude was surly, [his] outlook was bleak" when he was getting certified copies of his court files to send to San Diego, having realized the solution was to "try to get San Diego to correct its records." When he found that the item was on his credit reports, Mr Casella "could feel the blood pounding in [his] head," (Casella aff. ¶ 19), and he "yell[ed] that San Diego had made an entry in his credit report that he owed . . . back child support," (Klees aff. ¶ 17). While we understand his plight, these incidents only demonstrate the agony that San Diego, not the defendants, caused Mr. Casella. (He has not sued San Diego County but his attorney says that he is considering it.)

Plaintiff also asserts that he agonized over whether the volunteer company, in its investigation into his background, would find out about the disputed delinquency on his credit file. He worried about the humiliation he might suffer if they found out. Defendants point out there is no evidence that the company requested his credit history from defendants nor is there evidence that the fire company knew of the dispute. Moreover, plaintiff

was accepted into the volunteer company without any incident. Furthermore, although Mr. Casella worried about the fire department's background check and was afraid a credit check would be part of the investigation, he also "worried that there might be an outstanding arrest warrant out for him . . . and that he'd be arrested on the job or the street." (Klees aff. ¶ 20). He does not claim that this fear arises out of the San Diego dispute. Hence, he claims he suffered from the natural worries of a candidate for a sought after position. The credit delinquency item was but a part of his discomfort and we are not persuaded that it added such mental distress as to represent a cause of action.

Punitive damages, actual damages, and reasonable attorney's fees may be awarded according to Section 1681n when the reporting agency has willfully failed to comply with any of FCRA's requirements. "To be found in willful noncompliance, a defendant must have knowingly and intentionally committed an act in conscious disregard for the rights of others. Although malice or evil motive is not necessary to satisfy § 1681n, there must have been a willful violation." *Stevenson v. TRW Inc.*, 987 F,2d 288, 293-294 (5th Cir. 1993) (citations omitted). A careful review of the facts reveals a total absence of an intent or purpose by defendants to do harm to plaintiff. Hence, without evidence to support willful noncompliance, punitive damages are inappropriate.

Libel

Plaintiff has presented no evidence that his credit reports were disclosed to any individual after he disputed the San Diego delinquency. Nor has he presented any authority to support his assertion that the entry of a state agency claim of delinquent child support payments is libelous *per se*. Furthermore, the San Diego entry accurately reflected the claim then outstanding. As previously noted, independent of defendants, even the IRS held the claim to be true. Hence, the plaintiff has not demonstrated libel.

Communication to TRW

There is no indication that TRW, a consumer credit reporting agency unrelated to either defendant, was informed of San Diego's claim by defendants.

CONCLUSION

For the reasons stated above, plaintiff's motion for partial summary judgement is denied and defendant's motion for summary judgement is granted. The clerk shall enter judgement for defendants on all claims.

SO ORDERED,

Dated: White Plains, NY
May 9, 1994

GERARD L. GOETTEL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARMINE CASELLA, Plaintiff, -against- EQUIFAX CREDIT INFORMATION SERVICES and TRANS UNION CORPORATION, Defendants.	MEMORANDUM DECISION 93-Civ 3867 (GLG)

Plaintiff Carmine Casella has filed a motion for relief from judgment pursuant to Fed.R.Civ.P. 60(b), following our grant of summary judgment to both defendants. Plaintiff claims to have discovered new evidence that requires reinstatement of his claim that defendants willfully failed to comply with the provisions of the Fair Credit Reporting Act, 15 U.S.C. § 1681 (the "FCRA").

Federal Rule of Civil Procedure 60(b) provides that "[o]n motion and upon such terms as are just, the court may relieve a party ... from a final judgment ... for the following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Rule 59(b) provides for a ten day time limit for motions for a new trial. In order for newly discovered evidence to result in relief from judgment, the evidence must not be merely cumulative, must be material to the issues, and must be such that rehearing would probably produce a different result. *See Gemveto Jewelry Co. v. Jeff Cooper, Inc.*, 613 F.Supp. 1052, 1058 (S.D.N.Y. 1985), *vacated on other grounds*, 800 F.2d 256 (Fed. Cir. 1986).

In a memorandum decision dated May 9, 1994, we granted summary judgment to both defendants, finding as a matter of law that defendants had complied with the requirements of the FCRA, and that plaintiff had suffered no actionable damages. The source

of plaintiff's complaint was that the defendants were including in their credit reports a claim by San Diego County that plaintiff was delinquent in making child support payments, even though a New York court had cleared plaintiff of this obligation. Plaintiff sent copies of the New York court papers to both defendants, in an effort to persuade them to remove the delinquent credit item. Both defendants eventually retained the item, because San Diego County continued to report that plaintiff was delinquent. We wrote that "defendants had no duty to investigate and resolve what is in essence a legal or bureaucratic dispute underlying a creditor claim." *Casella v. Equifax Credit Info. Servs.*, No. 93 Civ. 3867 (GLG), Slip Op. at 9 (S.D.N.Y. May 9, 1994).

Plaintiff's instant motion focuses on whether defendants willfully failed to comply with their duty to use reasonable procedures to investigate disputed credit items. The evidence accompanying the summary judgment motions included a letter from San Diego County dated October 28, 1992, stating that the derogatory credit information on plaintiff was in error, and that the County was so notifying credit bureaus. Defendants denied receiving any such notification from San Diego County, and pointed out that the County had reaffirmed plaintiff's alleged delinquency in December, 1992.

Plaintiff's newly discovered evidence is the actual "Universal Data Form" used by the County to delete the derogatory credit information on plaintiff it had previously reported, along with an affidavit from a County employee stating that the form was mailed to defendants on October 14, 1992. Plaintiff also submits a similar form dated February 4, 1993, which similarly seeks to delete the derogatory information on plaintiff. There is no affidavit indicating when, or if, this latter form was mailed to defendants.

This new evidence is merely cumulative, and would probably not result in a different result if we were to reconsider the parties' motions for summary judgment. As to the October data form, plaintiff does not dispute the evidence that in December, 1992, the

County reaffirmed plaintiff's alleged delinquency. Thus, this is still a situation where credit reporting agencies were caught between a state agency reporting derogatory credit information, and a consumer who argued that a different state entity had cleared him of any delinquency. And as to the February data form, first, there is no evidence that it was mailed, and second, it is unclear whether it would have been received by defendants in time to alter their February credit reports, which are the basis of plaintiff's claims against them. This new evidence offers no reason to alter our previous conclusion that defendants acted reasonably.

Moreover, it is hard to believe that plaintiff could not with due diligence have uncovered this evidence either in time to present it in opposition to defendants' motions for summary judgment, or in time to make a motion under Rule 59(b). Well before motions for summary judgment were filed, plaintiff had received San Diego County's letter claiming to be in the process of notifying defendants that it was deleting the alleged delinquency. Plaintiff also knew that defendants denied receiving any such notification from the County. A duly diligent attorney in such a situation would have attempted to acquire from the County the letter or form by which it had sent notification to the defendants.

Defendant Trans Union Corporation asks us to sanction plaintiff and his counsel by awarding it attorney's fees. We decline this invitation. Plaintiff notes that in our earlier memorandum decision, we twice stated that there was no evidence that defendants were informed of the County's withdrawal in October 1992 of the delinquency item. Accordingly, it was not unreasonable for plaintiff to believe that if we were presented with solid evidence to the contrary, we might reach a different conclusion.

Plaintiff's motion is denied.

SO ORDERED.

Date: White Plains, New York.
July 27, 1994.

GERALD L. GOETTEL
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of September one thousand nine hundred and ninety-five.

Casella,

Appellant,

v. Dkt No: 94-7547

Equifax Credit Infor,

Appellee.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Carmine Casella.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk
By: Beth J. Meador,
Administrative Attorney

(2)

Supreme Court, U.S.
FILED
MAR 12 1996
CLERK

No. 95-1098

In The

Supreme Court of the United States

October Term, 1995

CARMINE CASELLA,

Petitioner,

v.

EQUIFAX CREDIT INFORMATION SERVICES AND TRANS UNION CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that Petitioner cannot recover for pain and suffering under the Fair Credit Reporting Act when no creditor or other person learned of his derogatory credit information from a credit reporting agency and he has failed to show that any of his claimed damages were, in fact, caused by alleged violations of the Act by the Respondent credit reporting agencies.

2. Whether the Court of Appeals properly affirmed the dismissal of Petitioner's claim that Respondent Equifax willfully violated the Fair Credit Reporting Act in the absence of any evidence of willful noncompliance under the "conscious disregard" or "deliberate and purposeful" actions standards that Petitioner cited to the Second Circuit or the "knowledge or reckless disregard" standard that Petitioner now advocates.

STATEMENT PURSUANT TO RULE 29.6

Respondent Equifax Credit Information Services has no nonwholly owned subsidiary. Its parent company is Equifax, Inc., which is publicly held.

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STATEMENT OF THE CASE

Respondent Equifax Credit Information Services ("Equifax") deleted the disputed San Diego County ("San Diego") account from Petitioner's credit file in June 1992, immediately after Petitioner's one and only request. Because San Diego had not reported the alleged debt to Equifax since December 1991 and Petitioner had informed Equifax that he was straightening out his problem directly with San Diego, Equifax deleted the entry with the reasonable expectation that no future reporting by San Diego would occur. However, the account was then unexpectedly re-reported by San Diego to Equifax and automatically entered into Petitioner's credit file. If, during the ensuing 11 months before he commenced this action, Petitioner had ever informed Equifax that the account was re-reported, Equifax would have deleted the account and taken steps to permanently prevent San Diego from re-reporting the account into his credit file.

Petitioner's claim that Equifax negligently violated the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, ("FCRA") must fail in the absence of evidence that he sustained *any* actual damages as a result. It is undisputed that Petitioner suffered no denials or reductions of credit after he notified Equifax of his dispute. As to Petitioner's claimed damages, the Second Circuit properly held that his pre-action attorney's fees predated any alleged violation of the FCRA, his alleged loss of mortgage opportunity was wholly speculative in light of his failure to make any effort to obtain a mortgage and his claimed emotional distress was not caused by any fault of the credit reporting agencies.

Petitioner criticizes the decision below on damages solely on the basis of the Second Circuit's statement that it did not believe a plaintiff could recover for emotional distress under the FCRA in the absence of any dissemination of his credit report. However, given Petitioner's utter failure to offer evidence of emotional distress caused by Respondents, the Second Circuit's statement of belief is not necessary to the determination of this action. Moreover, contrary to the allegations of the Petition, the Second Circuit's statement is eminently correct and reasonable under the FCRA and not in conflict with other Circuit Court opinions.

The record facts also fail to support Petitioner's claim that Equifax willfully failed to comply with the FCRA. Although Petitioner now seeks to appeal from the standard for willful noncompliance applied by the Circuit Court, he did not appeal from the same standard applied by the district court and, indeed, in his brief to the Circuit Court he cited with approval the very language that he now contests. In any event, even applying the "knowledge or reckless disregard" standard that Petitioner now advocates, the facts simply do not support a finding of any willful noncompliance on the part of Equifax.

A. EQUIFAX

Equifax is a consumer reporting agency which maintains a database of credit information made available to its subscribers in accordance with the FCRA. Equifax's database is composed largely of accounts receivable

information supplied monthly by its subscribers on magnetic computer tapes. Account information is automatically included in consumers' credit files when the tapes are loaded into Equifax's database. (JA 127-128).[1]

B. PETITIONER'S CREDIT DISPUTE

Petitioner's credit dispute arose from an interstate child support matter he litigated in New York State Family Court over a seven-year period, from 1982 to 1989. He described the "fight" as "long and ugly and bitter." (JA 148). San Diego apparently sued Petitioner to recover child support funds it allegedly expended on behalf of his estranged spouse and three children. (JA 265-266). Eventually, Petitioner's support obligations were declared terminated by an order of the Family Court and the file of his case was sealed. (JA 148). However, it appears that San Diego was unaware of such determination. (JA 266).

In March 1992, Petitioner was notified by two banks that his applications for credit cards had been declined. (JA 151). One rejection stated that Petitioner had made "too many recent requests for credit" (JA 193) and the other stated: "Housing type does not indicate stability, derogatory records present and delinquent credit obligations." (JA 199). The latter denial invited Petitioner to submit any additional information he wished to have considered, which Petitioner never did.

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[1] "JA ___" refers to the page of the Joint Appendix submitted to the Second Circuit.

Petitioner then obtained copies of his credit files from the Respondents, both of which contained an entry indicating that an outstanding child support obligation of $4,350 was claimed by San Diego. (JA 152, 204, 205). Petitioner and his attorney wrote to the Respondents requesting that the child support entry be expunged from his credit files and enclosed copies of documents from New York State Family Court indicating that the child support obligation had ceased. (JA 184-192). Petitioner's letter to Equifax also requested that other details in his credit file be amended. (JA 185).

In early June 1992, Equifax provided Petitioner with a copy of his updated credit file showing that Equifax had, pursuant to his request, deleted the San Diego entry and made other changes in his credit file. (JA 156, 228, 229). Because San Diego had not reported the alleged debt since December 1991, Equifax deleted the entry with the reasonable expectation that no re-reporting by the source would occur. (JA 128-129). No indication of a dispute was retained in Petitioner's file because the disputed item was deleted. (JA 337). By letter dated June 18, 1992, Petitioner thanked Equifax for its "expeditious response" in correcting the misinformation and stated that he and his attorney would be "locating and dealing with the reporting source from which this information originated." (JA 230).

Under these circumstances, Equifax had no reason to believe this matter would require further attention. (JA 129). However, on July 3, 1992, San Diego unexpectedly submitted the information again and it was consequently re-included in Petitioner's credit file by Equifax's automated system about 10 days later. (JA 127-129, 337-338).

Thus, in late July 1992, when Equifax, upon Petitioner's request, sent him another copy of his credit history, it again contained the San Diego child support entry. (JA 157, 235). Inexplicably, Petitioner did not contact Equifax regarding this matter at that time or, indeed, until he served the complaint in this action almost one year later. (JA 337). Equifax then deleted and permanently blocked the disputed item from Petitioner's file in July 1993. (JA 129). Had Petitioner notified Equifax of the item's reappearance when he became aware of it in July 1992, the problem would have been permanently resolved at that time. (JA 338).

Although San Diego advised Petitioner's attorney in October 1992 that Petitioner owed no money (JA 267-268) and, according to documents Petitioner submitted in support of his Rule 60(b) motion, purportedly advised Respondents that Petitioner's case was "closed per court order of responding state" (Supplemental Appendix of Appellant submitted to Second Circuit, at 365, 367), it continued to report the alleged debt as delinquent. San Diego sent Petitioner a notification dated November 2, 1992 indicating that he *still* owed $4,350 in overdue support and that such information "will be given to credit reporting agencies . . . " (JA 169, 276-277). In December 1992, San Diego again reported the child support obligation to the Respondents. (JA 269, 271, 337).

Petitioner did not contact either Respondent after receiving the November 1992 notice from San Diego that he still owed child support, other than to obtain another disclosure of his credit file in February 1993. When he found the San Diego entry contained therein he made no effort to notify the Respondents that any problem existed.

Indeed, prior to commencing this action in June 1993, Petitioner never contacted Equifax after his June 18, 1992 communication in which he indicated that his credit file had been *corrected*. (JA 161, 230).[2]

C. PETITIONER'S FAILURE TO SUSTAIN ANY DAMAGES

Petitioner was not denied any credit nor were any of his existing credit lines reduced after he notified Equifax about the disputed entry. (JA 63-64). In fact, Petitioner's credit file of February 19, 1993 (JA 269), compared with his credit file of July 20, 1992 (JA 235), shows that two of his accounts, MBNA AMER and DISCVR CD, received substantial increases in their credit limits during the time period in which Petitioner alleges he was harmed by Equifax.

Petitioner claims he wanted to buy a home (JA 149) but lost the opportunity to obtain a mortgage. (JA 109). However, Petitioner never applied for a mortgage nor made any offer on any house. He never even spoke with a banker, a mortgage broker or his own attorney about his possibilities of obtaining a mortgage. (JA 111, 113). Although Petitioner possessed documents that demonstrated he did not owe money to San Diego, he made no

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[2] Given Equifax's willingness to delete the San Diego entry immediately upon Petitioner's *single* request and Petitioner's failure to ever advise Equifax that the San Diego entry was re-reported after Equifax deleted it, Petitioner's repeated references to Equifax "obdurately" refusing to correct his credit history (Petition, 12, 18, 22) and to his "Orwellian nightmare" (Petition, 11) are hyperbolic, to say the least.

effort to satisfy any prospective lender of his credit worthiness. (JA 114-118, 184-190). He was allegedly dissuaded from obtaining a mortgage based solely on his speculative proposition that a hypothetical mortgage application to an undetermined lender for the purchase of an unspecified house would have been declined because of a particular entry in his credit report.

Petitioner also claimed that the San Diego entry in his credit file caused him emotional distress. He had submitted an application to a volunteer fire department in March 1992, at which time he signed a release permitting an investigation into his background. (JA 151).[3] According to Petitioner's companion, "he was afraid that a credit check would be part of the investigation, and . . . he'd be turned down if they saw the San Diego entry." (JA 289). He was also "worried that there might be an outstanding arrest warrant out for him that he didn't know about (something that actually happened during his struggle with the Family Court) and that he'd be arrested on the job or on the street." *(Id.)* Nevertheless, he was accepted into membership in the fire department without incident on or about June 1, 1992 (JA 154) – prior to any alleged fault on the part of Equifax for re-including the San Diego entry in Petitioner's credit file in July 1992. (JA 337-338.)

Nowhere in the record does Petitioner claim that anyone in his community, or anyone that he knew, ever

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[3] Contrary to the allegations of the Petition, the fire department required an unspecified background check (JA 195), not a "background and *credit* check." (Petition, 9 (emphasis added)).

learned about the San Diego child support entry. When repeatedly questioned on the subject of damages during his deposition, Petitioner did not claim he had suffered any emotional or mental harm due to a disclosure of his Equifax credit file. (JA 109, 121, 122). Indeed, there is *no* evidence in the record that Petitioner sustained emotional distress arising in any way from an Equifax credit report during the period of Equifax's alleged fault beginning July 1992. As the district court found, the record in this case abundantly shows that any distress allegedly experienced by Petitioner directly related to his ongoing dispute with San Diego, including, among other things, its causing the IRS to seize his 1991 tax refund. (A20, 23.)[4]

Petitioner also claims he incurred damages consisting of pre-action attorney's fees. However, these fees were exclusively incurred before he submitted his dispute to Equifax and consequently pre-dated any alleged violation of the FCRA by Equifax.

D. THE PROCEEDINGS BELOW

The district court granted summary judgment for Respondents. (A13-25.) It correctly held that Equifax properly handled Petitioner's dispute when it deleted the San Diego item and never heard from Petitioner again:

> The record shows that Equifax did promptly delete the disputed delinquency upon petition by plaintiff. Later, when San Diego County again reported the delinquency, Equifax re-entered it in plaintiff's credit file. In light of

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[4] "A___" refers to the page of the Appendix to the Petition.

> Equifax's unquestioning deletion of the delinquency item the first time plaintiff complained . . . there is no reason to doubt that they either would have similarly deleted the item if the plaintiff had complained a second time or investigated at such time. However, plaintiff never made such a second complaint to Equifax. He chose to break off communications with Equifax, apparently to deal with the problem at its source: San Diego County. Therefore, under these circumstances, Equifax investigated reasonably and sufficiently.

(A18-19.) The district court further held that Equifax, having deleted the disputed entry and having received no challenge to its reappearance, could not have expected that the inclusion of a dispute statement in Petitioner's credit report was necessary. (A20-21.)

The district court granted summary judgment on the additional ground that Petitioner presented no evidence of damages attributable to Respondents. (A21-24.) The court found that Petitioner's two denials of credit preceded his initial notification to Respondents. It is undisputed that San Diego reported the account to the credit reporting agencies. Accordingly, Respondents were not even arguably negligent before they received plaintiff's initial dispute, and the court held the denials of credit could not be blamed on Respondents. (A22.) The court rejected as too speculative Petitioner's claim that he was discouraged from applying for a mortgage. (A22-23.) Although the court recognized that emotional distress can constitute actual damages under the FCRA, it found, from the affidavit evidence Petitioner submitted, that his alleged distress was caused by San Diego continuing to

assert its claim rather than by Respondents reporting it. (A23-24.) Finally, the court found no evidence of a willful violation to support punitive damages under the FCRA. (A24.)

The district court denied Petitioner's motion for relief from summary judgment due to newly discovered evidence on the grounds that the purported evidence was merely cumulative and would probably not lead to a different decision on the summary judgment motion. (A26-28.) In addition, the court concluded that with due diligence Petitioner could have uncovered the evidence earlier. (A28.)

The Second Circuit affirmed the district court on the ground that Petitioner "utterly failed to produce any evidence constituting damages under the FCRA." (A6.) The court did not address the other grounds for the district court's decision. With respect to damages, the court considered and rejected Petitioner's claims for three categories of actual damages and for punitive damages.

The court first addressed Petitioner's claim for pre-litigation attorney's fees in the amount of $2,641. Since these fees represented the cost of letters notifying Respondents of Petitioner's dispute, they predated any possible liability under the FCRA and could not be compensable as actual damages. (A7-8.)

Next, the court affirmed the district court's holding that Petitioner's alleged emotional distress was not caused by Respondents' alleged violations of the FCRA. (A8-10.) The court noted that since there was no evidence that Respondents provided Petitioner's credit report to

any third parties or that anyone learned of any harmful information from Respondents:

> [Petitioner's] argument boils down to the bare contention that he is entitled to damages for pain and suffering simply because he *knew* of an inaccurate and potentially damaging item in his credit report."

(A9 (emphasis original).) The court expressed its belief that such a claim could not be established in the absence of evidence that a creditor or other person learned of derogatory information from a credit reporting agency. (A9-10.)

As to Petitioner's claim that he lost the opportunity to obtain a home mortgage, the Circuit Court affirmed the district court's holding that his claims were too speculative. (A10-11.) The court held that Petitioner "has completely failed to meet his burden of demonstrating any damages resulting from being deprived of a loan." (A11.)

Finally, the Second Circuit agreed with the district court that "the record is devoid of any evidence supporting a theory of willful noncompliance." (A11.) The evidence Petitioner presented on his Rule 60(b) motion simply suggested to the court that San Diego was sending mixed signals to Petitioner and Respondents. (A12.) The court held that these circumstances do not support "the kind of 'conscious disregard' or 'deliberate and purposeful' actions necessary to make out a claim for willful noncompliance under the FCRA." (A12.)

In the absence of any evidence supporting actual or punitive damages, the Circuit Court affirmed the dismissal of Petitioner's claims.

REASONS FOR DENYING THE WRIT

POINT I

THE SECOND CIRCUIT'S STATEMENT THAT IT DID NOT BELIEVE A PLAINTIFF COULD RECOVER FOR PAIN AND SUFFERING UNDER THE FCRA WHEN HE HAS FAILED TO SHOW THAT ANY CREDITOR OR OTHER PERSON EVER LEARNED OF DEROGATORY INFORMATION FROM A CREDIT REPORTING AGENCY IS (A) NOT NECESSARY TO THE DETERMINATION OF THIS ACTION, (B) EMINENTLY CORRECT AND REASONABLE UNDER THE FCRA, AND (C) NOT IN CONFLICT WITH OTHER CIRCUIT COURT OPINIONS

A. The Second Circuit's Statement is Not Necessary to the Determination of this Action

The Second Circuit affirmed the district court's rejection of Petitioner's pain and suffering claim on the ground that the alleged damages were not caused by Respondents:[5]

[5] Petitioner's criticism of the Second Circuit's statement is relevant only to the dismissal of his claim for pain and suffering – which was the sole subject of the court's statement. (A10.) Petitioner's other alleged damages were dismissed for reasons Petitioner is not now contesting. His claim for loss of mortgage opportunity was rejected by the Court as speculative (A10-11) and his claim for pre-action attorney's fees failed because the fees were incurred before the Respondents' alleged violations of the FCRA. (A7-8.)

> The [District] Court concluded, however, that appellant was not entitled to pain and suffering damages in this case, because he had failed to show that his emotional distress was *caused* by Equifax and Trans Union, as opposed to San Diego. Thus, appellant's claims were apparently rejected due to a *lack of causation* between the harm alleged by Casella and appellees' alleged violations of the FCRA. We think this was proper."

(A9 (citations omitted) (emphasis added).) In affirming the district court on causation grounds, the Circuit Court noted *Guimond v. Trans Union Credit Information Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995), in which the Ninth Circuit held that a cause of action may exist under the FCRA even absent a denial of credit. Without stating whether it would agree with *Guimond*, the Circuit Court set forth its *belief* that a plaintiff could not recover for pain and suffering under the FCRA unless there had been a dissemination of his credit report:

> Whether or not we would agree with *Guimond*, we do not believe a plaintiff can recover for pain and suffering when he has failed to show that any creditor or other person ever learned of the derogatory information from a credit reporting agency."

(A10.)

Petitioner's criticism of the decision below appears to be premised on the mistaken notion that the Second Circuit simply created a new rule of law and dismissed Petitioner's pain and suffering claim for failing to meet its new criterion. On the contrary, the Second Circuit appears to have reviewed the record, found that plaintiff

could not prove his damages were caused by Respondents and then stated its general belief that no plaintiff could establish that alleged pain and suffering was caused by a credit reporting agency in the absence of any dissemination of his credit reports.

Petitioner, by predicating the Petition only on his criticism of the Circuit Court's statement, ignores the preceding and vitally important point that the facts simply do not support his claim that he was injured by Respondents' alleged violations of the FCRA. His failure to prove that any damages were caused by Respondents is illustrated by the *only* alleged pain and suffering set forth in the Petition – his alleged fear that a background check in connection with his application to be a volunteer fireman would lead to a dissemination of the erroneous San Diego entry to his neighbors. (Petition, 9-10.) This fear was obviously laid to rest by June 1, 1992, when Petitioner was accepted into membership in the fire department. (JA 154.) Since Equifax had no potential liability until the San Diego entry re-entered Petitioner's credit file in July 1992 (JA 337-338), Petitioner's alleged pain and suffering entirely preceded and could not have been caused by any violation of the FCRA by Equifax.

A careful review of the record reveals no evidence of emotional distress caused by Petitioner's Equifax credit history after Equifax's alleged violation of the FCRA in July 1992. Petitioner could produce no evidence that any individual or business learned the contents of his credit report during the relevant period. He does not allege any facts showing damage to his business or personal reputation. In fact, he makes no specific allegation that he was

in any way emotionally distressed during the relevant period. As aptly noted by the Circuit Court:

> Casella's argument boils down to the bare contention that he is entitled to damages for pain and suffering simply because he *knew* of an inaccurate and potentially damaging item in his credit report."

(A9 (emphasis original).) Thus, the Second Circuit properly held – on the facts – that Petitioner failed to establish that Respondents' alleged violations of the FCRA caused him emotional distress. The Court's belief that a plaintiff could not establish pain and suffering in the absence of a dissemination of his credit report was not necessary to its decision and could be eliminated without affecting the determination of this case.

B. The Second Circuit's Statement is Eminently Correct and Reasonable Under the FCRA

The Second Circuit's statement that it did not believe a plaintiff can recover for pain and suffering in the absence of any dissemination of his credit report is eminently correct and reasonable under the language and purpose of the FCRA.

First, the language of the relevant provisions of the FCRA plainly limits their application to credit reports disseminated to third parties and not credit files retained in-house by credit reporting agencies. Section 1681e(b) requires a consumer reporting agency to follow reasonable procedures to assure maximum possible accuracy whenever it prepares a "consumer report." The term "consumer report" is defined as "any written, oral or

other *communication* of any information by a consumer reporting agency" for the purpose of serving as a factor in establishing a consumer's eligibility for, among other things, credit and employment. 15 U.S.C. § 1681a(d) (emphasis added). Thus, the "consumer report" upon which liability under § 1681e(b) can be predicated is by definition a credit report that is communicated to third parties.

A "consumer report" is distinct from a consumer "file," which is defined as "all the information on that consumer recorded and retained by a consumer reporting agency." 15 U.S.C. § 1681a(g). It is a consumer's "file," not his "report," that a consumer reporting agency must disclose to the consumer upon his request, 15 U.S.C. § 1681g(a), and that Petitioner received several times from Equifax. A consumer's concern about the contents of his "file," like Petitioner alleges here, does not state a claim under the language of § 1681e(b).[6]

Second, the Circuit Court's statement, if applied to other cases, would – like the existing case law – reasonably serve to limit claims under the FCRA to circumstances that are susceptible of proof beyond a plaintiff's subjective statements about his state of mind. In each case finding that emotional harm was a viable claim, it is clear

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[6] Similarly, § 1681i(c) requires consumer dispute statements under certain circumstances in "any subsequent consumer report." The statutory language again predicates liability on the dissemination of credit information to a third party. Section 1681i(a), which governs the reinvestigation of disputed information in a consumer's "file," is inapplicable here because Equifax deleted the San Diego entry immediately upon Petitioner's request.

that the consumer's injury was reasonably connected with a disclosure of his erroneous credit report to others. *See, e.g., Thompson v. San Antonio Retail Merchants Ass'n,* 682 F.2d 509, 514 (5th Cir. 1982). *But cf. Guimond,* 45 F.3d at 1332 (allowing claim for emotional distress when the defendant did not contest the existence or causation of the alleged damages). If pain and suffering were freely recoverable simply for viewing an adverse entry in a credit file, the door would be opened to a new type of claim under the FCRA, free of any objective standard and unlimited by anything but the creativity of the claimant. Such a drastic change in the law would obviously interfere with credit reporting agencies' ability to serve the "vital role" that Congress recognized when it enacted the FCRA. 15 U.S.C. § 1681(a).

Finally, Petitioner's concern that the Second Circuit's decision requires a consumer to encourage the dissemination of damaging information before he can commence a lawsuit (Petition, 12) ignores the consumer's right to punitive damages for a willful violation of the FCRA. 15 U.S.C. § 1681n. If Petitioner had genuinely been concerned about the dissemination of damaging information, he could have followed up on his one and only request that Equifax delete the San Diego entry. If he had, Equifax would have deleted and permanently blocked the account from his credit file. Had Equifax then refused to delete the account and willfully violated the FCRA, Petitioner could have commenced an action for punitive damages.

Another available remedy for violations of the FCRA is enforcement by the Federal Trade Commission ("FTC"). Under the FCRA's administrative enforcement

provision, consumer reporting agencies' "compliance" with the FCRA "shall be enforced" by the FTC. 15 U.S.C. § 1681s(a). Violations of the FCRA constitute unfair or deceptive acts or practices under the Federal Trade Commission Act, 15 U.S.C. §§ 41-58, and are subject to enforcement by the FTC under Section 5(b) of that statute. 15 U.S.C. § 1681s(a).

Accordingly, the Second Circuit's belief that a plaintiff cannot recover for pain and suffering in the absence of any dissemination of his credit report is consistent with the language and purpose of the FCRA and presents no obstacle to strict enforcement of the Act.

C. The Second Circuit's Statement Does Not Conflict with the Decisions of Other Circuit Courts

Even a cursory review of the Second Circuit's opinion reveals the outright falsity of Petitioner's representations that the Second Circuit "acknowledged" (Petition, 3 and 13) and "recognized" (Petition, 16) that its decision conflicted with the Ninth Circuit in *Guimond*. In *Guimond*, the Ninth Circuit held that a failure to comply with § 1681e(b) can be actionable even in the absence of a denial of credit. 45 F.3d at 1333. Rather than conflict with *Guimond*, the Second Circuit noted the language of *Guimond* and expressly refused to reach the issue on which the Ninth Circuit opined. (A10.) Instead, it stated its belief that a plaintiff could not recover damages for pain and suffering in the absence of a dissemination of his credit report. (*Id.*) The Second Circuit in no way "recognized" or "acknowledged" that its decision conflicted with *Guimond*.

In any event, *Guimond* is of little relevance here because the defendant consumer reporting agency in *Guimond* "did not contest [the consumer's] claims of damages, nor that those damages were the result of the inaccuracies in her credit report." 45 F.3d at 1333. Here, in contrast, Respondents contested the existence and causation of Petitioner's claimed damages. The issue on which the Second Circuit affirmed summary judgment – *i.e.*, Petitioner's failure to offer evidence that he sustained damages as a result of Respondents' violation of the FCRA – was not even before the court in *Guimond*.

Petitioner also claims that the decision below conflicts with *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47 (D.C. Cir. 1984), which he cites for the proposition that the FCRA does not limit recovery to damages caused by publication to third parties. However, Petitioner fails to explain that *Stewart* involved the "unusual circumstance" in which the defendant consumer reporting agency was also the user of the credit report. *Id.* at 154 n.12. There was, in effect, a transmission of the plaintiff's credit report from the defendant as a credit reporting agency to the defendant as an entity to which the plaintiff had applied for membership. The court in *Stewart* merely established a narrow – and quite obvious – exception that there can be liability under the FCRA without a publication to a third party when the consumer reporting agency and user of the credit report are the same entity.

In every other case cited by Petitioner, the alleged emotional distress accompanied damages arising directly from the dissemination of a credit report to third parties. *See Thompson v. San Antonio Retail Merchants Ass'n*, 682

F.2d 509, 514 (5th Cir. 1982) (plaintiff suffered embarrassment from being denied credit on three occasions); *Stevenson v. TRW, Inc.*, 987 F.2d 288 (5th Cir. 1993) (plaintiff was denied credit three times and experienced "considerable embarrassment" from having to discuss his erroneous credit report with business associates and creditors); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829 (8th Cir. 1976) (insurance policy canceled until erroneous report corrected); *Bryant v. TRW, Inc.*, 689 F.2d 72, 75 (6th Cir. 1982) (plaintiff denied mortgage loan because of an erroneous credit report). In each of these cases, the dissemination of a credit report objectively injured the plaintiff and provided a reasonable predicate for his alleged emotional distress. These cases are clearly not in conflict with the decision below, in which Petitioner's credit report was not disseminated and Petitioner did not proffer any evidence supporting his allegation of emotional distress during the relevant time period.

In sum, Petitioner has mischaracterized the Circuit Court's decision in order to create the appearance of a conflict that does not exist. The court's statement that it did not believe a plaintiff could establish pain and suffering under the FCRA in the absence of a dissemination of his credit report is consistent with the language and purpose of the FCRA, as well as the existing circuit court decisions. Moreover, Petitioner's criticism of the Second Circuit's statement, even if justified, would not warrant review because the court's statement was not necessary to its determination of this action. As the Second Circuit properly found, Petitioner has simply failed to demonstrate that Respondents caused any alleged damages. Accordingly, review should be denied.

POINT II

THE SECOND CIRCUIT'S CONSTRUCTION OF WILLFUL FAILURE TO COMPLY WITH THE FCRA IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISIONS CONCERNING THE INTERPRETATION OF "WILLFUL"

The FCRA permits the recovery of actual damages upon a showing that a reporting agency acted negligently. 15 U.S.C. § 1681o. However, in order to recover punitive damages, a plaintiff must meet a much stricter burden and demonstrate that the agency has "willfully" failed to comply with its obligations under the FCRA. 15 U.S.C. § 1681n. In the instant case, both the district court and the Circuit Court properly found that Respondents did not act willfully. Petitioner, dissatisfied with that result, now incorrectly argues that the Circuit Court applied an interpretation of "willfully" that is inconsistent with the standard that this Court has applied to other statutes. In fact, the standard used by the Circuit Court was entirely appropriate and completely consistent with this Court's previous – and varied – interpretations of "willfully."

Contrary to Petitioner's suggestion that there is one definition for "willfully" that must be applied in every instance, this Court has repeatedly held that " 'willful' . . . is a word of many meanings, its construction often being influenced by its context." *United States v. Bishop*, 412 U.S. 346, 352 (1973); *United States v. Murdock*, 290 U.S. 389 (1933); *Ratzlaf v. United States*, 114 S. Ct. 655, 659 (1994); *Spies v. United States*, 317 U.S. 492 (1943). In fact, this Court's definition of "willful" has varied and includes the following: "obstinate[ ]," or "plainly indifferent," *United States v. Illinois Cent. R.R. Co.*, 303 U.S. 239,

243 (1938); "without justifiable excuse," "stubbornly, obstinately, perversely," or "done without ground for believing it is lawful," *United States v. Murdock*, 290 U.S. 389, 394 (1933); "knowledge" that actions are in violation of law, *Ratzlaf*, 114 S. Ct. at 663; "reckless disregard," *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 130 (1988) and *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985); and "voluntary and intentional violation of duty," *Cheek v. United States*, 498 U.S. 192, 201 (1991).

This Court has also used *Roget's International Thesaurus* to supply various definitions of "willful." *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (quoting *Roget's International Thesaurus* § 622.7, at 479; § 653.9, at 501 (4th ed. 1977)). That source provides a wealth of acceptable synonyms for "willful," including "deliberate," "calculated," "purposeful" and "conscious." *Roget's International Thesaurus* § 653.9, at 501 (4th ed. 1977).

In this case, the Circuit Court applied a valid and reasonable standard and found that the actions of Respondents did "not support the kind of 'conscious disregard' or 'deliberate and purposeful' actions necessary to make out a claim of willful noncompliance under the FCRA." (A12.) The court's analysis is completely consistent with the way other courts have interpreted the punitive damages section of the FCRA using the "conscious disregard" standard as an equivalent for the myriad of acceptable expressions for "willfully." *See, e.g., Stevenson v. TRW, Inc.*, 987 F.2d 288 (5th Cir. 1993) (requiring "conscious disregard"); *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986) (applying "conscious disregard" test), *cert. denied*, 483 U.S. 1022 (1987); *Yohay v. Alexandria*

Employees Credit Union, Inc., 827 F.2d 967, 972 (4th Cir. 1987) (awarding punitive damages based on finding that defendant "consciously ignored" plaintiff's rights); *Wiggins v. District Cablevision, Inc.*, 853 F. Supp. 484, 490 (D.D.C. 1994) (applying "conscious disregard" standard).

In this action, the "conscious disregard" standard was first applied by the district court, which held: "To be found in willful noncompliance, a defendant must have knowingly and intentionally committed an act in conscious disregard for the rights of others." (A24.) Petitioner failed to appeal from that standard applied by the district court, thereby failing to preserve the issue for further appeals. *See Clark v. State Farm Fire & Casualty Ins. Co*, 54 F.3d 669, 673 (10th Cir. 1995) (failure to raise an issue in the court below precludes the raising of that issue in subsequent appellate actions).

Moreover, in his brief to the Second Circuit, Petitioner cited with approval the very standards that he now criticizes that court for adopting. At page 39 of Petitioner's brief, he stated: "In other words, appellees' *'conscious disregard'* of Casella's rights under FCRA prove [sic] willfulness." (Emphasis added). Also on that page, he quoted *Nitti v. Credit Bureau of Rochester*, 84 Misc. 2d 277, 375 N.Y.S.2d 817, 821 (Sup. Ct. Monroe Co. 1975), for the proposition that a defendant's actions willfully violated the FCRA because they "were not accidental . . . not innocent . . . not unintentional; but rather . . . they were *deliberate and purposeful.*" (Emphasis added). It is astounding that Petitioner now seeks to appeal from both the "conscious disregard" and "deliberate and purposeful" language that he himself suggested to the Second Circuit.

Petitioner attempts to rely on *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), in which the Court held that a "knowledge or reckless disregard" standard should be applied to allegations of willful violations of the Age Discrimination in Employment Act of 1967. However, the Court in *Hazen* made no attempt to promulgate "knowledge or reckless disregard" as the test for willful violations in all contexts. Moreover, Petitioner fails to cite a single case under the FCRA in which *Hazen* is identified as providing the appropriate standard for review.

A "reckless disregard" standard is used most often in libel cases when courts must determine whether a defendant published an article in "reckless disregard" of its falsity. In that context, this Court has described the "reckless disregard" standard as follows: "[The standard] is not measured by whether a reasonably prudent [person] would have published, or investigated before publishing [but whether a particular defendant] in fact entertained serious doubts as to the truth of [the] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). In fact, this is a subjective evaluation focused on whether a defendant has acted in good faith. *Bartimo v. Horsemen's Benevolent & Protective Ass'n*, 771 F.2d 894, 898-99 (5th Cir. 1985), *cert. denied*, 475 U.S. 119 (1986).

In the instant case, Petitioner presented no evidence that Equifax willfully violated the FCRA under the "reckless disregard" standard or any other legal standard. In fact, the district court correctly found from the undisputed evidence that Equifax acted reasonably in light of the information sent to it by San Diego. (A17-21). As noted by the district court, Equifax "did promptly delete the disputed delinquency" upon Petitioner's one and

only request. (A18). At that time, San Diego had not reported the alleged debt for six months, rather than every month as debts are usually reported (JA127-128), and Petitioner informed Equifax that he was straightening out his problem directly with San Diego. Accordingly, Equifax deleted the entry with the reasonable expectation that no future reporting by San Diego would occur. The account was subsequently re-included in Petitioner's credit file only because it was unexpectedly re-reported by San Diego by magnetic tape. When Equifax inputted San Diego's tape into its database, the disputed account was automatically included in Petitioner's file.

Almost immediately thereafter, Petitioner received a copy of his Equifax credit history containing the San Diego child support entry. He later received a notice from San Diego dated November 2, 1992, indicating that he still owed $4,350 in overdue child support and that such information "will be given to credit reporting agencies."

Inexplicably, Petitioner never followed up on his one and only request to Equifax after learning that San Diego was still reporting his account and that it had been re-included in his credit history. Instead, he simply obtained copies of his credit history, which Equifax repeatedly supplied upon his request, and, without a further word, commenced this action almost one year later. If Petitioner had notified Equifax of the San Diego item's reappearance when it occurred, Equifax would have permanently resolved the problem at that time. (JA 338.) However, Equifax received no information from Petitioner after June 1992, at which time he indicated that his credit history had been corrected. (JA 161, 230.) In the

meantime, San Diego continued to report the child support obligation to the Respondents. (JA 269, 271, 337.)[7]

Under these facts, there is no basis for finding willful non-compliance with the FCRA under any theory. Indeed, Petitioner cites *no* case in which reasonable conduct like Equifax's has been held to willfully violate the FCRA. To the contrary, under the well-established body of case law interpreting the FCRA, where a credit reporter, like Equifax here, provides the consumer with a copy of his credit history each time a request is made, does not conceal any information from him and cooperatively attempts to resolve his complaints, there simply is no basis for a finding of willful noncompliance. *Stevenson v. TRW*, 987 F.2d 288, 294 (5th Cir. 1993) (punitive damages vacated); *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986), *cert. denied*, 483 U.S. 1022; *Morris v. Credit Bureau of Rochester*, 563 F. Supp. 962, 969 (S.D. Ohio 1983).

Accordingly, review of the Second Circuit's holding that Equifax did not willfully violate the FCRA is not warranted.

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[7] Even if the Universal Data Forms that Petitioner submitted in support of his Rule 60(b) motion are considered despite his failure to satisfy the requirements of Rule 60(b), these forms, as the Second Circuit found, indicate at most that San Diego was sending "mixed signals" and do not establish any willful violation by Respondents. (A11-12.)

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Dated: New York, New York
March 12, 1996

Respectfully submitted,

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No. 95-1098

In The

Supreme Court of the United States

October Term, 1995

CARMINE CASELLA,

Petitioner,

v.

EQUIFAX CREDIT INFORMATION SERVICES AND TRANS UNION CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT TRANS UNION CORPORATION

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REASONS FOR DENYING THE WRIT

A. Introduction.

This is a routine matter arising under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (the "Act"). No novel questions were involved and well-established precedent determined the outcome. Up close, the dreaded "Hobson's choice" conjured by Petitioner is a mirage. All the Act requires of the consumer is a dispute. If the agency refuses or fails properly to investigate pursuant to § 1681i, the consumer has a remedy for that violation. However, a claim respecting Respondent's reporting procedures under § 1681e(b) requires a consumer report which by definition is a *communication* of information bearing on the consumer's eligibility for credit. It is simply the way the statute is written. Thus, Petitioner's claims as to the importance of this case, and the alleged threat to Act enforcement of the opinion below are wildly exaggerated and inaccurate. Along the way, Petitioner seriously miscasts the Act's legislative history and (to put it generously) misconstrues the holdings of dispositive court opinions.

Moreover, nothing about *this* case makes a review of *Guimond, infra*, urgent or, even necessary. In fact, the result below would not be changed by the application of *Guimond*. In addition, inconsistent earlier Ninth Circuit authority casts doubt on whether a circuit split actually exists. Finally, Petitioner's ill-conceived contentions respecting the correct definition of willfulness under the Act, are meritless.

B. Statement Of The Case.

In April, 1992, Petitioner, through counsel, disputed a delinquency reported in his consumer file by the County of San Diego, California ("San Diego").[1] Respondent, Trans Union

1. Throughout, Petitioner claims that TUC's database contained (Cont'd)

Corporation ("TUC"), investigated the dispute pursuant to the Act. San Diego authorities confirmed that the information reported was accurate. TUC informed Petitioner's counsel of the results of the investigation in writing on May 18, 1992. After July, 1992, neither Petitioner nor his lawyer contacted TUC again respecting the dispute except for the lawsuit filed in June, 1993. TUC never published Petitioner's credit report containing the disputed information to any third party.

Petitioner's counsel claimed that it was difficult to convince San Diego to change its report and Petitioner suffered much distress as a result of San Diego's intransigence. However, the court of appeals properly affirmed summary judgment because the record established undeniably that (a) TUC did not cause any harm alleged by Petitioner, (b) any such harm was not caused by any alleged violation of the Act by Respondent, and (c) nothing in the record justified a finding of a willful violation of the Act permitting punitive damages. The opinions of both the District Court and the Second Circuit comport entirely with the Act's legislative history, the language of its provisions, and a long list of court decisions.

C. Legislative History And Language Of The Act.

The legislative policy of the Act is that inaccurate information in a consumer's file is no basis for suit unless the agency involved failed to comply with one of the Act's specific requirements, *e.g.*, full file disclosure, dispute investigation, maintenance of reasonable procedures to assure accuracy of

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(Cont'd)
delinquent child support obligations pertaining to him. This is patently incorrect. The file showed only San Diego County as the creditor of an account placed for collection. Nothing in the database suggested even remotely that the account involved child support or revealed anything about the nature of the alleged debt.

reported information, etc. As Senator Proxmire cogently observed:

> . . . we took something which would be less satisfactory to the consumer . . . but which would work in most cases; that is, *whenever a consumer is turned down, he then would have the right to find out what is in his credit file and to have it corrected. . . But the theory is that until they are damaged in some way by an adverse reaction . . . they do not have as much basis for correcting it. . . .*

115 Cong. Rec. at 33411 (1969) (emphasis added).

Both comments in the Congressional Record[2] and discussions at the Hearings on S. 823[3] evince a congressional

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2. "The purpose of the fair credit reporting bill is to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a *credit report*. . . ." 115 Cong. Rec. at 33408 (1969) (statement of Sen. Proxmire) (emphasis added).

"Possible damage to that individual lies, not in the collection of the information or its dormant retention in the files, but in its *appearance in a report*." 115 Cong. Rec. at 15648 (1969) (statement of Sen. Bennett) (emphasis added).

3. "Senator Bennett: This bill would allow an individual to sue the credit bureau because *it disseminated information* supplied to it by an outside source . . ."

"Senator Proxmire: I am informed by the staffman . . . that *the consumer would not be in the position of being entitled to sue a credit bureau because it has adverse information.* All he can do is to require compliance with the law . . ." Hearings on S. 823 Before the Subcomm. On Banking and Currency, 91st Cong. 1st Session at 17 (1969) (emphasis added).

intent to make dissemination of a consumer report a prerequisite to liability.

The congressional purpose underlying the Act is that consumers not be denied credit on account of inaccurate information reported about them. In furtherance of that policy, consumer reporting agencies are obliged to disclose to consumers all information in their files pertaining to them. Consumers, in turn, may dispute information and require that non-verifiable information be deleted from their files. The statutory language fully comports with the drafters' announced intent that liability requires the transmission of information to third parties.

The Act defines a "consumer report" as follows: ". . . any . . . communication of any information bearing on a consumer's credit worthiness, . . . to be used . . . as a factor in establishing the consumer's eligibility for (1) credit. . . ." § 1681a(d). The Act defines a "file" as follows: ". . . all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored." § 1681a(g).

"Consumer report" is defined entirely by reference to transmission or communication to third parties for permissible purposes under the Act. The "file" is defined in static terms as "all of the information . . . regardless of how the information is stored" on a consumer.

These definitions are not abstract legalisms, but derive from the reality of the way consumer credit works. A consumer applies for credit. The creditor requests a consumer report to aid its decision. § 1681e(b) is triggered when the consumer reporting agency communicates creditworthiness data to the creditor. If the application is denied 15 U.S.C. § 1681m(a) requires that the creditor "advise the consumer . . . and supply the name and

address of the consumer reporting agency making the report." Absent a denial, the consumer is unaware of the report or identity of the consumer reporting agency involved. Not surprisingly, every reported case holding § 1681e(b) applicable involves a communication of a consumer report and a denial of the applied for credit, insurance, or employment. Similarly, the absence of these circumstances has resulted in dismissal of the claim.

D. Proceedings In The District Court.

The § 1681e(b)[4] claim pressed in this Court was not involved in the case in the District Court. The complaint contains six counts alleging respectively, violations of § 1681i, (*dispute reinvestigation*), (Count One); § 1681c (*obsolete information*) (Count Two); § 1681i(c) (*dispute statement*) (Count Three); § 1681g(a)(3)(A) (*disclosure requirements*) (Count Four); improper reporting to TRW (Count Five); and a state law libel claim (Count Six). The District Court's dismissal of Counts 2, 4, 5 and 6 was not appealed.

Petitioner's assertion that, "upon filing suit" TUC "immediately acknowledged" that the San Diego entry was "inaccurate" is false. (Petition, p. 9). TUC was never informed as to why San Diego modified its report, only that it did. Nothing in the record suggests much less proves that the San Diego entry was not accurate when disputed. On this point, Judge Goettel found ". . . the San Diego entry accurately reflected the claim then outstanding." (A24).

The question in the District Court was whether TUC had discharged its obligation to investigate Petitioner's dispute. In this connection, TUC's procedures were unassailable. After

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4. "Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."

TUC received Petitioner's April 1992 dispute, TUC promptly communicated with the San Diego authorities who confirmed the accuracy of the data previously and subsequently provided through automated tape. TUC informed petitioner's counsel of the results of the investigation in writing in May, 1992.

It is settled that, absent a dispute, TUC is entitled as a matter of law to rely upon the accuracy of information reported by public sources "because to require otherwise would be burdensome and inefficient." *Henson v. CSC Credit Services*, 29 F.3d 280, 286 (7th Cir. 1994); *Swoager v. Credit Bureau of Greater St. Petersburg*, 608 F. Supp. 972, 975 (D. Fla. 1985) and *McPhee v. Chilton Corp.*, 468 F. Supp. 494, 498 (D. Conn. 1978). Even in the face of a dispute, public record data need not be questioned unless:

> . . . the consumer has alerted the reporting agency to the possibility that the source may be unreliable or the reporting agency itself knows or should know that the source is unreliable. 29 F.3d at 287.

Here, despite the facts that Petitioner's assertion of dispute referenced a New York court order three years out of date and that there was no reason to suspect the reliability of the California source, TUC *without prompting* went beyond the data source. Indeed, Judge Goettel specifically found:[5]

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5. Petitioner's counsel requested a consumer statement, but his letter omitted crucial referenced enclosures purportedly from San Diego. Moreover, the consumer statement was entirely irrelevant to the dispute which concerned the San Diego reporting of a delinquency occurring in 1991. The consumer statement submitted concerned 1988 New York court orders, which predated the delinquency San Diego reported by more than 3 years. No consumer statement was placed in the file returned to Petitioner's counsel in July, 1992,

(Cont'd)

> We find that Trans Union's procedure is reasonable and sufficient to assure accuracy. When the delinquency item was disputed, Trans Union verified it through a different confirmatory source (inquiry to a person at the state agency itself) from the original transmission source (mass electronic data). Upon confirmation, Trans Union notified the consumer, informed him of the claim's origin, and gave him the opportunity to insert a countervailing argument into his credit report. A19.

Thus, Petitioner's claim that TUC ". . . provided no description of its reinvestigation [and that]. . . . The only source identified for the 'reinvestigation' was an entry on computer tapes automatically loaded into the Trans Union database" (Petition, p.7 n. 4) is clearly baseless. Contrary to Petitioner's claim of being kept in the dark, it was TUC which was kept in the dark by Petitioner. Petitioner's counsel treated his activities as private and never informed TUC of the outcome of his "negotiations" with San Diego.

Instantly, there was no way for TUC to know, unless advised by San Diego County or Petitioner, that San Diego's previous

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(Cont'd)
and he never protested the absence of the statement until the lawsuit was filed one year later.

This became a "non-issue"; publication to third parties is the express prerequisite to liability. There was some confusion because Judge Goettel felt that Petitioner's affidavit exceeded the 100 word limit. However, a word count proved otherwise. Judge Goettel need not have reached that question because it was admitted that no subsequent consumer report was ever issued. Moreover, TUC had no obligation to include Petitioner's patently irrelevant statement. § 1681i(c).

confirmation had been reconsidered. As noted by Judge Goettel:

> Defendants were not informed, either by plaintiff or San Diego, of the County's withdrawal in October 1992 of the delinquency item. Without notification, defendants reasonably considered the dispute resolved some five months earlier when San Diego had confirmed plaintiff's delinquency. A20.

Moreover, Petitioner overlooks the maxim that the Act does not require consumer reporting agencies to adjudicate whether an obligation reported by one court had been extinguished by another court in a different jurisdiction. In this regard, Judge Goettel properly held:

> ... defendants had no duty to investigate and resolve what in essence is a legal or bureaucratic dispute underlying a creditor claim. In this case, we cannot expect defendants to have declared San Diego's claim invalid. Expecting credit reporting agencies to independently police the validity of state claims would burden commercial dealings beyond any currently required legislative mandate. A19-20.

Notably absent from the Petition is any coherent assertion that TUC should have, or even could have, investigated the dispute differently. Petitioner's counsel in 1992 recognized that TUC could not represent his client's interests before the San Diego courts. When he was informed of the investigation and its results, counsel never urged that the matter be re-opened or expressed dissatisfaction with TUC's inquiries. Nowhere does

Petitioner challenge the central finding that TUC had fully discharged its obligation to Petitioner under the Act.

Petitioner's lamentations aside, there is no reason to speculate on the outcome of any loan application he may have been considering, but allegedly did not submit for fear of imagined consequences. The loan may have been granted, notwithstanding the San Diego information; or, it may have been refused, even if the San Diego information were not present.

The alleged constraint on Petitioner's prerogatives resulting from San Diego's recalcitrance is not harm caused by TUC or cognizable under the Act. Were it otherwise, consumer reporting agencies would be obliged to remove all disputed information, even though verified, for fear that a particular consumer may later prevail on the source of the information to change its reporting. If "accuracy" were thus judged retroactively, the effect would be to read the dispute procedures out of the Act; no agency could ever regard a dispute as "resolved", irrespective of the reasonableness of the investigation conducted.

E. Proceedings In The Court Of Appeals.

1. The Second Circuit's Correct Analysis Of The Act.

The Petition's point of departure is not the Act, but rather the affirmance of the Second Circuit that no conduct of TUC was the legal cause of any harm to Petitioner and that claims under the Act's reporting provisions could not be invoked unless there was a report which caused harm. That the Second Circuit correctly affirmed on causation grounds, does not change the accuracy of Judge Goettel's holding that TUC's investigation satisfied the requirements of the Act.

On appeal, the Second Circuit decided it was unnecessary to reach explicitly the sufficiency of TUC's investigation. The court held that no cognizable harm under the Act had been shown. This approach fully accords with those adopted by other circuit and district courts.[6]

In *Henson v. CSC Credit Services*, 29 F.3d 280, 286 (7th Cir. 1994), the Court specifically held:

> In order to state a claim under 15 U.S.C. § 1681e(b), a consumer must sufficiently allege 'that a credit reporting agency prepared a report containing inaccurate information.'

In *Cahlin v. General Motors Acceptance Corp.*, 936 F.2d 1151, 1160 (11th Cir. 1991), the absence of proof that the denial of credit was caused by the alleged inaccurate information was fatal to plaintiff's § 1681e(b) claim:

> We need not reach the substance of Cahlin's FCRA claims against TRW because we find that he has utterly failed to produce any evidence tending to show that he was damaged as a result of an allegedly inaccurate TRW credit report . . . *Cahlin bears the burden of proving that a TRW credit report was a causal factor in the denial of his residential mortgage loan by First Nationwide.* (emphasis added)

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6. *See, e.g., Whelan v. Trans Union Corporation*, 862 F. Supp. 824, 832 (E.D.N.Y. 1994); *Ladner v. Equifax*, 828 F. Supp. 427, 432 (S.D. Miss. 1993).

In *Koropoulos v. Credit Bureau, Inc.*,[7] 734 F.2d 37, 42 (D.C. Cir. 1984), the court held:

> [a consumer may only bring a cause of action pursuant to § 1681e(b)] if a credit reporting agency issues an inaccurate report on the consumer, since only then does harm flow from the agency's violation.

Universally, the established essential elements of a cause of action under § 1681e(b) include proof that the agency reported inaccurate information about the plaintiff. *See Morris v. Credit Bureau of Cincinnati, Inc.*, 563 F. Supp. 962, 967 (S.D. Ohio 1983); *Whelan v. Trans Union, supra*; *Houston v. TRW Info. Services, Inc.*, 1989 WL 59850 (S.D.N.Y.) *aff'd*, 896 F.2d 543 (2d Cir. 1990); *Neptune v. Trans Union Corp.*, 1993 WL 505601 (E.D. Pa.), *aff'd*, 27 F.3d 558 (3rd Cir. 1994); *Bryant v. TRW, Inc.*, 689 F.2d 72, 78 (6th Cir. 1982); *Thompson v. San Antonio Retail Merchants Ass'n*, 682 F.2d 509, 513 (5th Cir. 1982).

Strangely, Petitioner contends that his view that transmission is not required is supported by *Stevenson v. TRW, Inc.*, 987 F.2d 288 (5th Cir. 1993); *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143 (5th Cir. 1983); *Bryant v. TRW, Inc., supra*; *Thompson v. San Antonio Retail Merchants Association, supra*; *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829 (8th Cir. 1976); and *Rasor v. Retail Credit Company*, 87 Wash. 2d 516, 554 P.2d 1041 (1976). In fact, each and every one of these cases involves a transmission of a credit report and a denial of credit. The Second Circuit's opinion below is

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7. Petitioner cites only *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47 (D.C. Cir. 1984), (the companion to *Koropoulos*), where the court specially noted: "This case involves the unusual circumstance that the defendant credit reporting agency is also the credit report user. . . ." 734 F.2d at 54 n. 12. It would obviously make no sense to require that the agency disseminate to itself.

consistent with the foregoing authorities and there is no basis for further review by this Court.

2. *The Second Circuit's Correct Definition Of "Willfulness."*

Petitioner's contentions respecting "willfulness" under the Act evince a misreading of *Hazen Paper Company v. Biggins*, 113 S. Ct. 1701 (1993) and a flawed understanding of the difference between willful and negligent conduct.[8]

In *Hazen* this Court specifically rejected any definition which would "virtually obliterate any distinction between willful and non-willful violations." *Hazen, supra*, 113 S. Ct. at 1708-9. Here, the Second Circuit correctly held that a finding of willful noncompliance required a showing of "conscious disregard" or a "deliberate and purposeful action." 56 F.3d at 476. Petitioner concedes the foregoing accords with the established law and never articulates how this standard differs materially from that in *Hazen* in any event.

Petitioner's muddled discussion simply establishes no basis for this Court to review the Second Circuit's application of long-standing "willfulness" standards under the Act.[9]

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8. For example, petitioner intones: "[u]nder conventional standards for willfulness, a consumer could prevail on a showing that the credit bureau failed to take reasonable measures to investigate and to correct inaccuracies once the error was brought to its attention." (Petition, p.14). The source of such "conventional" standards is never identified. However, such circumstances were found to support only negligence and not willfulness in *Stevenson v. TRW, Inc.*, 987 F.2d 288, 297 (5th Cir. 1993).

9. *See, Stevenson, supra*; *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986), *rehearing denied*, 812 F.2d 1405, *cert denied*, 107 S. Ct. 3267, 3276, 97 L. Ed. 2d 766, 780 (1987); *Bryant v. TRW, Inc.*, 487 F. Supp. 1234, 1239 (E.D. Mich, 1980), *aff'd*, 689 F.2d 72 (6th Cir. 1982).

F. *Guimond* Although Wrongly Decided Would Not Change The Result Below And Is An Unreliable Indicator Of A Split In The Circuits.

While this case was pending before the Second Circuit, the Ninth Circuit decided *Guimond v. Trans Union Credit Information Co.*, 45 F.3d 1329 (9th Cir. 1995). The Ninth Circuit held that a consumer could bring a claim under § 1681e(b) based on information provided to him pursuant to the Act's mandatory file disclosure provisions. The consumer need not demonstrate a denial of credit which would have been granted had the report been free of the disputed erroneous information. Indeed, the information need not have been "reported" to any third party. In short, the materiality of the information to the consumer's eligibility for credit was held to be irrelevant.

The Ninth Circuit reached this result without any real analysis of the Act and with barely a mention of the contrary expressions of virtually every other court which had construed the Act previously, including Ninth Circuit panels. No court has followed *Guimond*. Given the opportunity, the Second Circuit wisely chose not to do so. The Second Circuit simply held that no claim based on erroneous information could be brought under the Act unless the erroneous information had been reported. The Second Circuit declined further explicit comment on *Guimond*, but like other circuits embraced the logic that claims under the Act should be judged first through the prism of whether the harm alleged was cognizable. This widely accepted approach was disallowed by the *Guimond* court without explanation.

The *Guimond* court extended § 1681e(b) to compensate a consumer for mental distress[10] arising from inaccurate but

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10. TUC has never disputed that "mental distress" may be a compensable consequence of a violation of the Act. Indeed, many courts have so held, but *only* when the elements of a violation are established. Mental distress no more proves a violation of § 1681e(b) than lost profits proves a breach of contract.

unreported information, if a jury could find it was in the file as a result of the agency's failure to maintain reasonable procedures. No other court has ever applied the § 1681e(b) standards in that way. This result is especially bizarre because the Act mandates the disclosure in the first place. In *Guimond*, the inaccuracies alleged were never claimed to be even slightly material to the plaintiff's access to credit, insurance or employment.[11] The "reasonable procedures for accuracy" component of the Act was intended to apply to matters material to eligibility contained in consumer reports, not to every conceivable bit of data in the database.

TUC believes that *Guimond* is profoundly wrong. TUC also believes that *Guimond* is irreconcilable with the opinions of the other courts, including Ninth Circuit precedent purportedly overruled *sub silentio*. Nevertheless, TUC opposes review because *Guimond* would not change the result instantly, and its status as precedent for the Ninth Circuit's view on the matter is suspect.

First, even under *Guimond*, a *prima facie* violation of the Act must be demonstrated. In *Guimond*, it was the reappearance after removal of previously disputed inaccurate information. In a nutshell, *Casella* would be decided no differently under *Guimond* because there is no proof of an underlying violation of the Act, *i.e.*, TUC conducted a proper investigation and it was entitled to consider the dispute resolved once the data had been verified. Therefore, any "conflict" with *Guimond* is irrelevant.

Second, it is not clear that the panel's decision in *Guimond* should be taken as a reliable Ninth Circuit precedent evidencing a split between it and the other circuits. Although rehearing *en*

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11. The "inaccuracies" concerned use of a pre-labeled "spouse" field to designate a joint obligor and his social security number. The other alleged error was a non-derogatory Saks account.

banc was refused, and the matter was remanded to the district court for now pending further proceedings, the panel's decision in *Guimond* is inconsistent with the conflict reconciliation opinions of the Ninth Circuit and its value as precedent is uncertain, at best.

In *Hansen v. Morgan*, 582 F.2d 1214, 1218 (9th Cir. 1978), the Court defined "consumer report" as requiring a "communication of information ... to be used ... for the purpose of establishing the consumer's eligibility for credit transactions." Seven years later, the same court specifically held that ". . . the Act is not activated until . . . information is transmitted." *Kates v. Crocker National Bank*, 776 F.2d 1396, 1397 (9th Cir. 1985).

In *Guimond*, the panel was aware of *Kates*, but never acknowledged *Hansen*. The court determined that § 1681e(b) was not "... predicated, as a matter of law, on the ... transmission of the report to third parties. . . ." 45 F.3d at p. 1333. Then, somewhat incongruously, it cited *Kates* for authority that "the legislative history of the FCRA reveals that it was crafted to protect consumers from the *transmission* of inaccurate information about them." 45 F.3d at p. 1333 (emphasis added).

The *Guimond* panel's failure to recognize the conflict between its decision and *Kates* and *Hansen* is puzzling. After all, the conflict does not arise subtly from the application of obscure legal principles. The question is whether § 1681e(b) requires transmission. *Hansen* and *Kates* answer in the affirmative; *Guimond* in the negative. Both views cannot simultaneously be correct. Such a departure from the prior decisions of earlier panels has been expressly disapproved by the Ninth Circuit opinions governing *en banc* review.

In *United States v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992)

(*en banc*), *cert. denied,* 113 S. Ct. 1429 (1993), the Court declared that conflict resolution among circuit panels requires *en banc* review (reaffirming *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987) (*en banc*), *cert. denied*, 485 U.S. 989, 108 S. Ct. 1293, 99 L. Ed. 2d 503 (1988), and overruling *Greenhow v. Secretary of Health & Human Services*, 863 F.2d 644 (9th Cir. 1988).[12]

Compliance responsibility for the rule in *Atonio* rests with the panel involved: "[a] panel faced with such a conflict *must* call for *en banc* review." *Id.* at 1348, emphasis in original. All of the foregoing cases involved situations in which the second panel was either unaware of the prior case or misjudged its authority to resolve conflict. Neither is true as to the decision of the *Guimond* panel. There the inconsistent case is referenced but without recognition of the conflict involved. *Guimond* has been remanded for further proceedings to the District Court. One would hope that those proceedings will explicitly determine the precedential value of *Guimond*, if any, in the face of *Hansen* and *Kates*. Any such proceeding would benefit from the wisdom expressed by Circuit Judge O'Scannlain, (concurring) on the importance of acknowledging conflicts and calling for *en banc*

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12. *Greenhow* did not cite the prior *en banc* opinion in *Atonio* and the panel in *Hardesty*, 958 F.2d 910 (9th Cir. 1992), relied on the panel decision in *Greenhow* and *Atonio* went unmentioned. In addition, the conflict referenced in *Hardesty* on the merits also arose because the panel deciding the later case, *United States v. Terrovona*, 785 F.2d 767 (9th Cir. 1986), was unaware of an earlier inconsistent decision of another panel on the same issue, *United States v. Thornton*, 710 F.2d 513 (9th Cir. 1983).

The district judge in *Hardesty* seemed also unaware of *Atonio*, but held *Thornton* controlling because it was decided earlier. The panel in *Hardesty* believed that it was not necessarily bound by the earliest panel decision, but relying on *Greenhow* determined that it could apply its own judgment as to which decision had become most associated with the circuit's view.

review, *Koff v. United States*, 3 F.3d 1297, 1300 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1537 (1994):

> I believe we do ourselves little credit, and the lawyers and litigants who practice before us little good, when we ignore an irreconcilable conflict in our decisions. We must inevitably produce such conflicts. To be sure, we can paper them over easily enough. But in doing so we tolerate and, indeed, encourage, abiding uncertainties in our circuit law, undermining the predictability and uniformity of treatment for which we are bound to strive. The law of this circuit, in short, is far more likely to develop in a rational fashion when we acknowledge our mistakes and move quickly to correct them than when we contrive to disavow them.

The uncertainty as to the existence of a circuit split undermines the appropriateness of this case for review. This is particularly so because the Second Circuit's opinion is consistent with the well-reasoned and long-standing views of every other court.

CONCLUSION

For all of the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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No. 95-1098

In The

Supreme Court of the United States

October Term, 1995

CARMINE CASELLA,

Petitioner,

v.

EQUIFAX CREDIT INFORMATION SERVICES and TRANS UNION CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION OF THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, THE NATIONAL CONSUMER LAW CENTER, THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS, U.S. PUBLIC INTEREST RESEARCH GROUP, CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, MASSACHUSETTS PUBLIC INTEREST RESEARCH GROUP, THE NATIONAL CONSUMERS LEAGUE, AND BANKCARD HOLDERS OF AMERICA FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.3 of the Rules of this Court, the National Association of Consumer Advocates, the National Consumer Law Center, the National Association of Consumer Bankruptcy Attorneys, U.S. Public Interest Research Group, California Public Interest Research Group, Massachusetts Public Interest Research Group, the National Consumers League, and Bankcard Holders of America hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the attorneys for the petitioner has been obtained. The consent of the attorneys for the respondents was requested but refused or withheld.

The interest of the *Amici* in this case arises from their positions as among the leading and most active consumer rights organizations in this country and their particular involvement, past and present, in the enforcement of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t ("FCRA"). *Amici* respectfully suggest that it will be useful to the Court to consider their views, which focus in the attached brief on the adverse effect of the ruling below on the aspects of the FCRA separate from its impact on the consumer credit arena.

The FCRA is in fact much broader than a credit statute, and the positions expressed have not been addressed by the court below or the Petitioner. *Amici* contend that, among other things, the Second Circuit opinion, if allowed to stand, will impede private enforcement of the statute and will impair the ability of ordinary citizens to participate successfully in such endeavors as seeking employment, applying for a security clearance, renting an apartment, and many other common activities for which credit reports are used.

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INTEREST OF *AMICI CURIAE*

The National Association of Consumer Advocates ("NACA") is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, and law professors and students whose primary practice involves the protection and representation of consumers. Its mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members as well as consumers in the ongoing struggle to curb unfair and abusive business practices. From its inception, NACA has focused its efforts in the areas of fraudulent sales and unlawful banking practices, including abuses in the extension of credit and the collection of debts. Consistent with its goal of promoting justice for consumers in the credit arena, NACA has appeared as *Amicus Curiae* before a number of federal and state appellate courts, including last term, when NACA appeared as *Amicus Curiae* before this Court in *Heinz v. Jenkins*, 115 S.Ct. 1489 (1995), in support of the consumer's contention, adopted by the Court unanimously.

The National Consumer Law Center, Inc. ("NCLC") is a non-profit Massachusetts corporation, founded in 1969, specializing in consumer law issues, with an emphasis on consumer credit. Its primary focus and mission are the interests of low-income consumers. On a daily basis NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of eleven practice treatises and annual supplements

on consumer credit laws, including *Fair Credit Reporting Act*, 3rd ed. (NCLC 1995), and *Unfair and Deceptive Acts and Practices*, 3rd ed. (NCLC 1991, Cum. Supp. 1995), as well as bi-monthly newsletters on a range of topics related to consumer credit issues and low-income consumers. Since before passage of the Fair Credit Reporting Act, the fairness, accuracy, and disclosure of credit information about individuals have been of persisting concern to NCLC's low income clients.

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 500 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 100,000 bankruptcy cases filed each year. NACBA is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. Because many debtors have credit report problems which have developed due to difficult financial circumstances, NACBA has a significant interest in proper administration and enforcement of the Fair Credit Reporting Act.

U.S. Public Interest Research Group ("USPIRG") is the national lobbying office for state Public Interest Research Groups located in 31 states. State PIRGs are non-profit, non-partisan research and advocacy organizations with more than 500,000 members. USPIRG has published a series of reports highlighting the vast number of consumers affected by credit bureau inaccuracies. California Public Interest Research Group and Massachusetts Public Interest Research Group have been instrumental in passing stronger credit reporting laws in their states.

Through consumer complaint centers in Los Angeles, Washington, D.C., and Boston, these groups have assisted numerous consumers who have been victims of credit bureau inaccuracies.

The National Consumers League ("NCL"), founded in 1899, is America's pioneer consumer organization. NCL's three-pronged approach of research, education, and advocacy has made it an effective representative and source of informational for consumers and workers. NCL is a private, non-profit organization dedicated to representing consumers on issues of concern, including health care, food and drug safety, fair labor standards, telecommunications, and fraud.

Bankcard Holders of America ("Bankcard Holders") is a national, non-profit organization dedicated to consumer credit education and advocacy. Founded in 1980, Bankcard Holders has a current membership of more than 30,000 individual consumers. Bankcard Holders receives no financial support from the banking or credit industry. Instead, it relies on membership dues and publication sales. In addition to its bi-monthly newsletter reporting on credit industry practices and credit card opportunities, the organization has published and distributed nearly two dozen educational pamphlets for credit card consumers, including "Consumer Credit Rights" and "Credit Cards: What You Don't Know Can Cost You!"

ARGUMENT OF LAW

A. Introduction

The Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t ("FCRA" or "the Act"), was enacted in 1970 as Title VI of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r ("CCPA"), the plenary regulation by Congress of the national consumer credit industry. The decision below creates an irreconcilable split within the Circuits on the precise issue presented by the Petitioner, departs from the standards of statutory construction mandated by this Court in its prior teachings under the CCPA, and wreaks havoc with the CCPA's integrated and comprehensive statutory scheme. Accordingly, *Amici* urge this Court to grant the writ of certiorari in order to restore uniformity of interpretation and application of the FCRA by the lower federal courts and to re-establish the critical enforcement role of individual consumers acting as private attorneys general, as intended by Congress, in this vital sector of the national economy.

B. The FCRA is Part of the Integrated Regulatory Scheme Established by Congress to Insure That Credit Decisions Are Made on the Basis of Only Accurate and Reliable Information

The consumer credit industry has expanded over one hundred fold in the last fifty years and is now one of the largest sectors of the national economy. Growing from six billion dollars at the end of World War II, outstanding consumer credit debt rose to 116 billion dollars in 1970 when the FCRA was enacted and now has reached over 700 billion dollars. S. Rep. 103-209, 103d Cong., 1st Sess.

2-3 (1993). To support this phenomenal level of activity, the consumer reporting industry maintains 450 million credit files on more than 110 million individuals, virtually the entire adult population of the country, and processes almost 2 billion pieces of data per month. *Id.*, at 3. In view of the demonstrated potential for error in operating this informational maze, Congress explicitly recognized that the health of the consumer banking system is "dependent upon fair and accurate credit reporting" and that "[i]naccurate credit reports directly impair the efficiency of" that system. 15 U.S.C. § 1681(a)(1).

A recurring theme which is at the heart of the CCPA is that the dissemination of accurate credit information is essential to maintain the vitality of the credit granting system for the benefit of creditors and consumers alike. Just as Congress enacted the FCRA with the express purpose that credit grantors be in the best position to make reliable decisions with regard to whom to extend credit, the Truth in Lending Act, 15 U.S.C. §§ 1601-1667e, Title I of the CCPA ("TILA"), establishes the corresponding principle through its disclosure requirements that consumers are best served through their own "informed use of credit." 15 U.S.C. § 1601(a). In addition to the FCRA and TILA, Congress has included a further self-help checking mechanism within the CCPA as Title VII, the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f ("ECOA"), providing yet another information sharing standard through its core requirement that creditors disclose, and consumers receive, the specific reasons for any adverse action taken, such as credit denial. 15 U.S.C. § 1691(d).

The guiding principle of this congressional philosophy was succinctly summarized by this Court more than twenty years ago in its initial and seminal teaching under the CCPA: "[B]lind economic activity is inconsistent with the efficient functioning of a free economic system such as ours." *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 364 (1973). Credit decisions made in ignorance or without the benefit and appreciation of accurate information, whether made by credit grantors or consumers, undermine the vitality of the consumer economy. Creditors who grant credit to over-extended consumers create inefficiency and added costs just as assuredly as do consumers who borrow money without the means to re-pay their loans.

C. The Credit Reporting System Remains Plagued By Inaccurate Information

Unfortunately, despite the intent and best efforts of Congress in adopting the FCRA, accurate information is not being consistently provided by the consumer reporting industry to its credit granting clientele. Nearly half of all consumer reports maintained by the three major credit bureaus (two of which are the Respondents in this case) contain inaccurate information. S. Rep. 103-209, *supra*, at 3. The staggering statistic that nearly 20% of the complaints filed with the Federal Trade Commission concern the consumer reporting industry, *id.*, is indicative of the extent to which ordinary citizens are frustrated and disappointed by having inaccurate information maintained in their credit reports. Reflecting the experience of the Petitioner here, 94% of these complaints are in regard to

uncorrected errors, and 16% state that "corrected" errors subsequently re-appeared. *Credit Bureaus: Public Enemy #1 at the FTC*, The Public Interest Research Groups (October 1993). Consumers filing these complaints spend an average of 23 weeks dealing directly with the reporting agency to resolve their dispute, and 63% of the complainants have had five or more contacts with the reporting agency before seeking assistance from the FTC. S. Rep. 103-209, *supra*, at 6.

The successful operation of the consumer credit system is a key factor in the performance of the national economy and in the ability of all citizens to enjoy the fruits of this country's material prosperity, the envy of the rest of the world. Failure within this system, on the other hand, is expensive and is largely defined by the rate of consumer default, with its resulting abuses and significant personal toll ["bankruptcies, marital instability, loss of jobs, and invasions of individual privacy" (15 U.S.C. § 1692(a))], which Congress has sought to prevent and deter through enactment of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o, Title VIII of the CCPA ("FDCPA"). Despite the extraordinary economic and personal benefits at stake, *Amici*'s experience is that the consumer credit system is currently operated with far too little regard for the price of failure or the mandates imposed by Congress to cure its shortcomings.

D. The Second Circuit Decision Here is Directly Counter to the Policy of Disclosure and Reporting of Accurate Information

The decision below has turned the FCRA into a disinformation statute, in direct contravention of Congress' will. The decision establishes as normative behavior within the industry, and in fact as a requirement of enforcing the FCRA, that credit reports be distributed with known inaccuracies and that credit decisions must be made on that basis. The major problem which Congress identified in enacting the FCRA is inaccurate information within the consumer credit system, and its primary solution adopted throughout the CCPA is to eliminate erroneous data. Ironically, the Second Circuit has now directed that erroneous credit reports must be disclosed to a potential creditor and acted upon in order for a consumer to cure the very inaccuracies that Congress has required should be eradicated before a credit application is even evaluated. *See*, 15 U.S.C. § 1681e(b).

The Respondents are reporting agencies, not credit grantors, a fact which necessarily has influenced the position which they have taken throughout this litigation. Specifically, they have urged the courts below to adopt a requirement that credit reports can be submitted to creditors with known inaccuracies. The Respondents have ignored both the cost to the credit industry of being provided erroneous information on which to evaluate a consumer's credit worthiness and the salutary and preventive role that consumers have been afforded by Congress through the Act to ensure accurate credit-granting decisions. As conduits of information and not credit extenders, the Respondents share none of the financial

risk inherent in the ultimate decision to approve a credit application. Their self-interest coincides with that of neither credit grantors nor consumers.

E. The Decision Below Impairs the Primary Enforcement Mechanism Established by Congress to Maximize the Informed Use of Credit By Both Consumers and Creditors

A second recurring theme of the CCPA is the recognition by Congress of the limitations of the public sector in policing its enforcement. The two federal agencies charged with primary responsibility for administering this law, the Federal Trade Commission and the Federal Reserve Board, simply do not have the ability or resources to monitor or manage the entirety of this nation's consumer credit economy. The individual consumers whose lives are disrupted by unlawful credit practices, however, are painfully aware when and where credit abuses occur, are individually and personally affected by them, and are therefore uniquely motivated and equipped to compel industry to comply with its statutory responsibilities.

Accordingly, each of the referenced Titles of the CCPA contains the essential provision effectuating Congress' preference that enforcement of the law be undertaken by aggrieved consumers acting as private attorneys general. 15 U.S.C. § 1640(a) (TILA); 15 U.S.C. §§ 1681n and 1681o (FCRA); 15 U.S.C. § 1691e(d) (ECOA); 15 U.S.C. § 1692k(a) (FDCPA); *see, e.g.*, S. Rep. 95-382, 95th Cong., 1st Sess., 5, *reprinted in* 2 U.S. Code Cong. & Admin. News 1695, 1699 (1977) (FDCPA) ("The committee

views this legislation as primarily self-enforcing; consumers who have been subjected to collection abuses will be enforcing compliance."). The Federal Trade Commission itself has recognized the extent of its inability to assure accuracy in 450 million credit files by acknowledging that the FCRA "was designed to be largely self-enforcing" and has expressed its position directly to Congress that any amendments to the Act maintain "the capacity of consumers to bring private actions to enforce their rights under the statute." S. Rep. 103-209, *supra*, at 6.

To assist in this private policing effort, the FCRA contains several provisions which assure that consumers are permitted to know the contents of their credit files and establish a comprehensive system for investigating, re-investigating, and correcting inaccurate or incomplete information. 15 U.S.C. §§ 1681d, 1681e, 1681g, 1681h, 1681i, 1681j, 1681*l*, and 1681m. Indeed, virtually the entirety of the Act is designed to provide consumers with the means to effectuate this aspect of Congress' intent, and most of these provisions are designed to be prophylactic in operation, permitting the consumer to act proactively to correct inaccurate information before applying for credit.

The decision below effectively cripples the Act's private enforcement mechanism. The Second Circuit opinion holds that a consumer such as the Petitioner here, who made every effort available under the Act to compel Respondents to correct demonstrably and objectively false data, may not employ the established procedure of last resort – judicial intervention – without having first taken the futile and in fact self-destructive step (*see* Section F, *infra*) of applying for credit and being turned

down. Significantly, §§ 1681n and 1681o do not explicitly provide for injunctive relief, and the only prospective remedy for unlawful credit reporting is a suit for damages. The plain legislative intent is that a successful suit under the FCRA has the effect of compelling future compliance, yet the decision below removes that remedy and leaves entire sections of the Act little more than precatory language.

F. The Decision Below Ignores the Directive From This Court That the Judiciary Refrain From Interfering With the CCPA's Comprehensive Regulatory Scheme Through Creative Judicial Interpretation

Clearly, the Second Circuit went beyond the language employed in the FCRA to reach its result. It cited no authority in support of its holding, and as stated by the Ninth Circuit in reaching the opposite conclusion, there is no authority whatsoever "stating that a denial of credit, and not mere credit inaccuracies, are necessary for recovery under FCRA." *Guimond v. Trans Union Credit Information Company*, 45 F.3d 1329, 1333 (9th Cir. 1995).

Not only is credit denial not a prerequisite for maintaining suit under the Act, but, as discussed above, the majority of its provisions are founded on the congressional determination that both consumers and creditors must have accurate information before making and evaluating a credit application. The decision below therefore undermines the structure and balance of the FCRA and eliminates one of the most important means chosen by Congress to assure that credit is granted when deserved

and denied when not. The net effect, at least within the jurisdiction of the Second Circuit, is that national policy as set by Congress to maintain the strength and health of the consumer credit industry has been judicially altered.

This Court stated sixteen years ago, specifically in the context of the CCPA, that the federal judiciary is ill equipped to substitute its judgment through statutory interpretation for the legislative decisions made by Congress: "[J]udges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme." *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555, 565 (1980). The danger of such judicial activism is vividly illustrated here, where the Second Circuit's necessarily limited view of the case before it prevented it from considering, let alone evaluating, the impact that its departure from the statutory language would have on the intricate and interdependent provisions of the FCRA in particular and the CCPA in general.

For example, the Second Circuit clearly was unaware that imposing a new requirement that aggrieved persons must first apply for credit and be turned down before invoking the civil liability remedy of the FCRA is to insist that applicants affirmatively harm their credit profiles. The credit industry considers the number of previous credit applications appearing in a credit report as negative information in evaluating credit worthiness. Federal Trade Commission Staff Letter, Division of Credit Practices, David G. Grimes, Jr., August 1, 1994; *accord, Palmiotto v. Bank of New York*, 1989 WL 114156 (N.D.N.Y. 1989). One of the paradoxes created by the decision below is that a consumer who knows that a creditor will be provided inaccurate information which can form the

basis for adverse action must add the additional burden of an apparent credit denial to an already negative credit report.[1] Creating additional damages in an FCRA suit should not be either the goal or effect of judicial interpretation. The decision below unfortunately achieves this result, while at the same time preventing the FCRA from performing as intended "to assure maximum possible accuracy of information." 15 U.S.C. § 1681e(b).

Another inadvertent result of the decision below is to foster the granting of credit to applicants who are not entitled to it. *Amici* are all too aware of the consequences of credit over-extension and the heavy toll that the improvident granting of credit takes on the most vulnerable members of society, as is Congress. 15 U.S.C. § 1692(a). As discussed above, the dissemination of inaccurate information benefits no one, consumer, creditor, or society at large. Nevertheless, the decision below encourages, and indeed requires, that credit reports be published with known inaccuracies. Some inaccuracies, such

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[1] To be precise, an excessive number of prior inquiries showing in a credit report is treated by the industry as a negative factor in evaluating credit worthiness. *See*, 15 U.S.C. § 1681g(a)(3) (establishing protocol for disclosing inquiries). While an inquiry by itself does not necessarily translate into a credit denial, a credit report showing an inquiry without a corresponding account with the inquiring creditor does increase the possibility that a credit application was made and rejected. Industry considers excessive inquiries as an indication that "consumers may be overly anxious to obtain credit or that they are about to become overextended." FTC Staff Letter, *supra*, at 2. Thus, as a consequence, the mere fact that multiple inquiries have been made remains a disqualifying factor.

as wrong or incomplete information identifying the applicant, result in creditors granting credit to individuals who do not meet prevailing standards of credit worthiness. Thus, in some instances where the Second Circuit now has required that inaccurate credit reports be submitted, credit may actually be granted, to the detriment of all concerned.

The critical point is that the decision below eschews the language and framework of the FCRA, and therefore the considered judgment of Congress, in favor of the panel's view of how the Act should work. This Court has warned of the perils of that methodology, which, as predicted, have now come to fruition.

G. The Adverse Consequences of the Decision Below Are Not Limited to the Consumer Credit Industry

Since this case has arisen in the context of a consumer credit dispute, it is only natural that the court below limited its analysis to that sphere. Nevertheless, the FCRA is not so narrow, with its coverage extending to all other situations in which credit reports are used: employment, insurance, governmental licensing, in response to court order, and in any other circumstance where there is "a legitimate business need for the information in connection with a business transaction involving the consumer." 15 U.S.C. § 1681b.

As onerous as it is to require an individual to be turned down for credit before being able to seek to compel a reporting agency to provide accurate information, imposing a pre-condition of adverse action in these other

areas is no less than pernicious. A small sampling of the typical and regular uses for which credit reports are generated includes seeking a job, applying for a security clearance, renting an apartment, applying for insurance, or proving financial responsibility in a child custody dispute or to be appointed by a court as a relative's guardian. The decision below applies equally to these endeavors and many others where delay or denial literally can ruin a life. Congress was aware of the extent to which credit reports are used in this country and knew the importance to every citizen of being able to correct errors before publication. The Second Circuit, apparently unwittingly, has ignored this aspect of the FCRA, with consequences of immeasurable harm.

The imposition by the Second Circuit of its requirement that a consumer must first be subjected to adverse action in order to maintain suit to correct reporting errors also ignores the different treatment under the FCRA for adverse action in the credit, employment, and insurance areas and all others. Specifically, § 1681m requires the consumer to be notified of adverse action and of the identity of the credit reporting agency making the report only in the context of credit, employment, and insurance, leaving the consumer uninformed of the fact or impact of inaccurate information in a credit report used for other purposes. Thus, in those circumstances, the decision below creates an intolerable Catch 22, where persons who know of erroneous information in their credit reports cannot correct the information until they show that the information has led to adverse action of which, by virtue of § 1681m, they are unaware.

Another example of the unintended consequences of the Second Circuit decision is to cause consumers with uncorrected errors in their credit reports to be treated less favorably with regard to the marketing initiatives generated by the recent innovation of credit report "prescreening." "Prescreening" is a cooperative process between credit reporting agencies and direct marketers where the "agencies use their files to create and sell lists of consumers who meet specifications provided" by the marketers "for general direct marketing solicitations not initiated by the consumer." S. Rep. 103-209, *supra*, at 3-4. A consumer such as the Petitioner, whose report erroneously listed thousands of dollars of outstanding debt but who was denied the right to have that information corrected in accordance with the Act, is placed in a position of being offered higher priced products and being denied ready access to lower priced goods and services, which are made available in accordance with the characteristics appearing in the existing credit reports. If the decision below is allowed to stand, such a consumer would never know of the adverse consequences proximately caused by the erroneous report and would be denied the prescreening benefits offered to all other qualified consumers, yet would not be able to compel the reporting agency to correct the credit file as mandated by the Act.

CONCLUSION

Amici respectfully urge that the writ of certiorari be granted to correct this misguided result and to resolve the split within the Circuits on this important question of national policy and federal statutory construction.

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No. 95-1098

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CARMINE CASELLA,

Petitioner,

v.

EQUIFAX CREDIT INFORMATION SERVICES AND TRANS UNION CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES OF COURT APPEALS FOR THE SECOND CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The credit reporting agencies' defense of the Second Circuit's ruling only underscores the irrational limitation that it imposes on the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681-81t. The credit reporting agencies agree that, under the Second Circuit's interpretation, the FCRA requires that consumers encourage the agencies to disseminate false information that damages their credit and reputation before the consumer can bring a claim under the statute. The impact of this interpretation is particularly stark in this case, where credit agencies' automated systems continued to list the erroneous debt as an undisputed obligation after the consumer provided the agencies with an affidavit and court orders showing that the entry was in error, and after the creditor notified the agencies that the entry was wrong.

The credit agencies' contention that the FCRA provides no relief for consumers confronted with such recurring errors highlights the need for review by this Court to resolve the division in the Circuits on the interpretation of the remedial provisions of the FCRA. In this reply, we first show that the credit agency's arguments that certiorari should be denied because the ruling below could be sustained on alternative grounds are inaccurate. The issues on which petitioner seeks review — whether the FCRA requires denial of credit as a prerequisite to a cause of action, and what is the correct standard for punitive damages under the FCRA — are squarely presented in this case. We then show that the credit agency's defense of the ruling below only confirms our point that the Second Circuit's construction of the FCRA renders the Act self-defeating and useless as a remedy where, as frequently occurs, credit agencies fail to correct recurring errors in their automated credit reporting systems.

I. THE QUESTIONS PRESENTED ARE SQUARELY PRESENTED IN THE RULING BELOW.

A. Despite Contrary Rulings By Other Circuits, The Second Circuit Ruled That Denial of Credit Is A Prerequisite To An Action For Actual Damages Under the FCRA.

There is no dispute that the Second Circuit's conclusion that denial of credit is a prerequisite to maintaining a cause of action for actual damages under the FCRA is in direct conflict with the Ninth Circuit's holding in *Guimond v. Trans Union Credit Information Co.*, 45 F.3d 1329 (1995). Indeed, both of the credit agencies insist that *Guimond* is wrong, and argue that the Second Circuit's contrary statement of the law in this case is correct. *See* Equifax Opp'n at 15-16; Trans Union Opp'n at 11-12. There is no escaping the fact that these decisions directly conflict over the interpretation of an important federal statute, and that conflict can only be resolved by this Court.[1]

Equifax, however, repeatedly contends that the Second Circuit's statement that a consumer cannot maintain a cause of action absent proof that the error was communicated to others was not the basis for the decision below. *See* Equifax Opp'n at 1-2, 15, 20. Equifax argues that petitioner's claim was actually rejected for lack of proof of causation or damages. *Id.* at 8, 14, 20. The

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[1] The credit agencies also acknowledge that the Second Circuit's ruling is contrary to *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47 (D.C. Cir. 1984), but dismiss *Stewart* as an unusual case because it involved a credit agency making use of its own credit report. *See* Trans Union Opp'n at 11 n. 7; Equifax Opp'n at 19. *Stewart*, however, did not need to adopt an unusual construction of the FCRA to conclude that the Act provides a cause of action for harms caused without the dissemination of erroneous information. Moreover, *Stewart* is in direct conflict with the credit agencies' contention that the FCRA can never be violated unless a credit agency has distributed a "consumer report" to third parties. *See, e.g.*, Equifax Opp'n at 15-16.

Second Circuit's ruling, however, shows that the court found petitioner's claims for lost opportunity and pain and suffering damages deficient only because it held that the FCRA requires proof that the damages are caused by dissemination of an erroneous report to third parties.

Indeed, the court acknowledged that Petitioner provided ample evidence that he had suffered anxiety and severe emotional distress. *See* App. at A8. But the Second Circuit rejected his claim for these damages because there was no evidence "that any potential creditor or other person . . . learned of any harmful information from [the credit reporting agencies]." App. at A9. In the same way, the court recognized that petitioner presented evidence that he was seeking to purchase a home and had sufficient resources to obtain a mortgage, but "refrained from making any credit applications in order not to tarnish further his credit history." App. at A10. The court held petitioner's claim for loss opportunity damages failed because he "presented no evidence that any potential creditor bank even received his credit report." App. at A11. The dismissal of both of these damage claims was based entirely on the Second Circuit's decision to reject *Guimond* and hold that damages are not recoverable under the FCRA unless they are caused by dissemination of the derogatory information to third parties.

Similarly, Trans Union argues that the Second Circuit's conflict with *Guimond* is irrelevant because Trans Union's conduct with regard to Mr. Cassella did not violate any provision of the FCRA. Trans Union Opp'n at 14. However, the Second Circuit specifically declined to endorse Trans Union's claims that its conduct was justified. To the contrary, the court noted that the district court's rulings on Trans Union's conduct were marred by factual errors, *see* App. at A3-A4, and emphasized that the appellate court did *not* reach the question of whether Trans

Union's conduct was appropriate under the FCRA. *Id.* at A6. The Second Circuit based its ruling *solely* on the conclusion that petitioner's damages were not recoverable under the FCRA.

Indeed, Trans Union's assertion that its conduct was "unassailable," Trans Union Opp'n at 5, is belied by the record. Trans Union received an affidavit and court order showing that the child support entry was inaccurate, received a formal statement of dispute, and even received instructions from San Diego that the entry was an error that should be deleted. Even Equifax cannot bring itself to support Trans Union's contention that it is appropriate for a credit reporting agency to continue to rely on automated computer entry in the face of such contrary evidence. Indeed, Equifax deleted the entry immediately after it received the same affidavit and court orders provided to Trans Union, and asserts that it would have deleted it again if it was aware that its automated system had restored the entry. Equifax Opp'n at 5, 25. Thus, the conflict between the ruling below and *Guimond* is squarely presented in this case, and should be resolved by this Court.

B. The Second Circuit's Ruling On Punitive Damages for Willful Violation Of The FCRA Is In Conflict With The Standard Announced By This Court in *Hazen Paper*.

The credit agencies make similar arguments against review of the Second Circuit's ruling on punitive damages, but these claims are equally lacking in merit. First, Trans Union argues that there is no material difference between the interpretation of the term "willful" adopted by the Second Circuit in this case, and the interpretation in *Hazen Paper Company v. Biggins*, 113 S. Ct. 1701 (1993). However, the "conscious disregard" standard employed by the Second Circuit in this case is identical to the standard that *Hazen Paper* held was inappropriate when it ruled

that a violation is willful if the defendant "knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute." *Id.* at 1710. Indeed, this Court emphasized that proof of a willful violation does not require the proof of outrageous conduct that the Second Circuit demanded in this case. *Id.*

Equifax does not dispute that the standards used in this case and *Hazen Paper* are in conflict. Instead, it maintains that petitioner failed to preserve this issue on appeal. Equifax Opp'n at 23. This contention is erroneous. Petitioner challenged the denial of punitive damages on appeal. App. at A11. Equifax correctly notes that petitioner argued that the "conscious disregard" standard of *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986), *cert. denied*, 483 U.S. 1022 (1987), was satisfied in this case. However, petitioner also argued that punitive damages were appropriate under cases affirming that a willful violation is established where the credit agencies show a "reckless disregard" for plaintiff's rights. *See Thorton v. Equifax, Inc.*, 619 F.2d 700, 705 (8th Cir.), *cert. denied* 449 U.S. 835 (1980) (quoted at page 38 of the Brief of Appellant). Although petitioner did not cite *Hazen Paper* on appeal, it is the presentation of the issue, not citation of a particular case, that is necessary to preserve an issue for further review. *See Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 100 (1991).

Finally, the credit agencies note that the Second Circuit is not alone in interpreting the "willfully fails to comply" language of 15 U.S.C. § 1681n to require an especially high standard of proof. *See* Trans Union Opp'n at 12 n.9. This is true, but it only underscores the necessity of review. The high standard imposed in these cases cannot be reconciled with this Court's holdings that Congress intended virtually identical language in the Age Discrimination and Employment Act of 1967 ("ADEA"), 29

U.S.C. § 626(b), to establish a less demanding standard. Both statutes establish similar two-tiered liability schemes for actual and punitive damages, and the FCRA was adopted just three years after the ADEA. Thus, this Court's conclusion that the term willful had acquired an accepted interpretation that was well-understood by the time Congress enacted the ADEA, *see Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126-27 (1985), strongly supports the conclusion that Congress intended for this term to have the same meaning in the FCRA.

II. THE CREDIT AGENCIES' ARGUMENTS UNDERSCORE THE SIGNIFICANCE OF THE RULING BELOW.

The credit agencies' remaining arguments only reinforce our original point that the ruling below leaves consumers victimized by credit reporting errors without any rational remedy. Trans Union characterizes the situation presented here as "a routine matter," Trans Union Opp'n at 1. This characterization is accurate. Studies show that errors in credit reporting systems are frequent, and the errors often persist even after the consumer brings them to reporting agencies' attention.[2] However, Trans Union and Equifax do not dispute that the construction of the FCRA adopted by the Second Circuit leaves consumers facing this frequent problem without any recourse unless they deliberately injure their credit in order to bring a claim under the FCRA.

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[2] *The Consumer Reporting Reform Act of 1994*, S. Rep. No. 209, 103d Cong., 1st Sess. 3 (1993) (19 percent of consumer credit reports contain errors that could adversely affect the consumer's eligibility for credit); *The Consumer Reporting Reform Act of 1993: Hearings Before the Subcommittee on Consumer Credit and Insurance of the House Committee on Banking, Finance, and Urban Affairs*, 103d Cong., 1st Sess., S. Hrg. 80, 432 (1993) (consumers who complained to FTC had already complained to credit bureau, without satisfaction, for an average of 31 weeks).

Indeed, in this case the consumer took each step set forth in the FCRA to correct the error without filing suit — but each step proved futile. Mr. Casella notified the agencies of the error as provided in 15 U.S.C. § 1681i(a), and even provided affidavits and copies of court orders demonstrating that the debt had been satisfied. App. at A3. When Trans Union refused to delete the entry despite this information, Mr. Casella also provided a statement of dispute pursuant to 15 U.S.C. § 1681i(c), which Trans Union simply ignored. App. at A3-A4. Moreover, Mr. Casella's counsel had the creditor notify the credit agencies that the disputed entry was in error and should be deleted. App. at A27. Again, no action was taken.

Nevertheless, Trans Union maintains that Mr. Casella still did not have a cause of action, even after he had exhausted all other avenues to correct the error.[3] The only way for consumers like Mr. Casella to challenge a credit agencies' refusal to delete an erroneous entry, Trans Union maintains, is to apply for a home mortgage or other credit and be rejected. Trans Union Opp'n at 11. While this contention accurately describes the effect of the decision below, it demonstrates the devastating consequences that this ruling has on enforcement of the FCRA. Application for a home mortgage is a major undertaking that most consumers would

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[3] Indeed, Trans Union maintains that it had no obligation to delete the entry or acknowledge the dispute at all. *See* Trans Union Opp'n at 5-6. As noted in our petition, however, Trans Union's contention that it was entitled to accept the report from the creditor as accurate, despite the protest from the consumer and evidence to the contrary, has been repeatedly rejected by the lower courts, which have confirmed that the reporting agency's obligation to reinvestigate includes an obligation to evaluate and question the accuracy of disputed items. *See, e.g. Stevenson v. TRW, Inc.*, 987 F.2d 288, 293 (5th Cir. 1993); *Swoager v. Credit Bureau of Greater Petersburg*, 608 F. Supp. 972, 976 (M.D.Fla. 1985). Moreover, Trans Union repeatedly fails to mention that it continued to report the debt at issue here even after the creditor notified it that the entry was erroneous and should be deleted. *See* App. at A27.

not, and should not, undertake where adverse credit reports would render the effort futile. Moreover, denial of such a credit application is reported by credit agencies as an indication that the consumer is not credit worthy. Thus, the ruling below requires that a consumer urge the dissemination of inaccurate, derogatory information, and add more adverse entries to his or her credit report, in order to challenge a reporting agency's refusal to correct an erroneous entry.

Equifax does not dispute that the child support entry in its report was erroneous and should have been deleted. Instead, Equifax argues that consumers like Mr. Casella are required to anticipate that credit agencies will repeat errors even after they are deleted, and must resubmit their challenges on the assumption that the credit agencies' automated systems will restore the erroneous entry. Equifax Opp'n at 5. Despite Equifax's assurances that another notice by Mr. Casella would have convinced it to permanently delete the error, the evidence shows that Equifax continued to report the error even after it received a notice from the creditor that the entry should be deleted. App. at A27.[4] Moreover, the FCRA contains no requirement that consumers submit multiple notices when credit agencies repeatedly make the same error. 15 U.S.C. § 1681i(a).

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[4] Equifax's assertions that the reappearance of the erroneous entry was "unexpected" and it had a "reasonable expectation that no future reporting by San Diego would occur," Equifax Opp'n at 25, are not substantiated by evidence. In the record below Equifax never offered any testimony to explain why it failed to block the entry from reappearing when it was first notified of the error. To the contrary, studies show that the reappearance of errors that were supposedly corrected occurs frequently, and is a major source of complaints against Equifax and other credit agencies. *See* Brief of Amici Curiae in Support of Petition for a Writ of Certiorari, at 6-7 (describing study of Federal Trade Commission complaints).

Most importantly, Equifax's argument about a second notification is beside the point because, under the Second Circuit's ruling, the number of notices sent to the credit agency is irrelevant. According to the court, consumers who refrain from applying for credit while the credit agency considers their second, third, fourth or even twentieth request to correct the error forfeit their rights under the FCRA and cannot recover damages for lost opportunities, nor for the humiliation and frustration caused by having to repeatedly revisit the same errors. Of course, consumers suffer real damages if they must forego employment or credit opportunities or must repeatedly confront false accusations in a credit report because a credit agency fails to correct an error when first notified. *See, e.g.,Thompson v. San Antonio Retail Merchants Ass'n*, 682 F.2d 509 (5th Cir. 1982) (awarding $10,000 in actual damages for humiliation and mental distress where consumer had spent months urging the reporting agency to cure the error and succeeded only after bringing suit). Nonetheless, consumers who take the prudent course of not encouraging the publication of erroneous information are left without any recourse for these harms under the ruling below.

Thus, although the credit agencies resist our contention that the decision below presents an Orwellian nightmare for consumers confronted by computerized systems that repeatedly generate inaccurate reports, their arguments confirm the dilemma the decision below poses for consumers. The Second Circuit's paradoxical interpretation should be reviewed by this Court because it has a devastating effect on the ability of the FCRA to perform its most basic objective of protecting consumers against erroneous credit reports.

CONCLUSION

For the reasons stated above and in the petition, this Court should grant the petition for certiorari.

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